

Climate Courage: Remaking Environmental Law

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We are living in the shadow of convergent crises. Social, racial, and economic inequality tears at the fabric of democracy. Global ecological crisis rips at the seams of social stability. Amidst these convergent crises, climate change looms. Climate change threatens to destabilize society and exacerbate existing patterns of inequality. However, it also creates opportunities to disrupt persistent patterns of exclusion and inequality as we

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pursue pathways for a just transition. Climate change compels us to rethink the role of environmental law in advancing transformative change. It invites us to consider how environmental law perpetuates inequality and how environmental law can operate more effectively to advance structural change. This Article advances that project.

Climate Courage highlights the existence of a swelling movement to advance environmental and climate law in ways that better align with other progressive law reform projects. It begins by disentangling the roots of U.S. environmental law to understand how the field emerged and evolved alongside but largely detached from other contemporary law reform movements before examining how the environmental justice movement and complementary projects are prompting a critical reassessment of environmental and climate law. The Article then identifies how intersecting crises are spawning a new generation of leaders who are unleashing more inclusive visions of life under and beyond the rule of law. Focusing on climate change, Climate Courage shows how these movements are creating opportunities to reimagine and remake environmental law.

If we act now, together, united, to save those of us on the front lines,
in the end it will also end up saving the rest of the world.

- Kathy Jetn̄il-Kijiner

Iep Jāltok, Poems from a Marshallese Daughter (2018)

I. INTRODUCTION

Climate change is profoundly reshaping our world in deeply different ways. Climate change will have devastating effects¹ for people who are already socially, politically, and economically vulnerable. This includes people living in poverty,² people of color,³

1. As Petteri Taalas, the Secretary-General of the World Meteorological Organization (WMO), says, “The science is clear. Without rapid cuts in [carbon dioxide] and other greenhouse gases, climate change will have increasingly destructive and irreversible impacts on life on Earth. The window of opportunity for action is almost closed.” Press Release, World Meteorological Organization, Greenhouse Gas Levels in Atmosphere Reach New Record (Nov. 20, 2018), <https://public.wmo.int/en/media/press-release/greenhouse-gas-levels-atmosphere-reach-new-record>.

2. See U.N. Dep’t of Int’l Econ. & Soc. Affs., *World Social Report 2020: Inequality in a Rapidly Changing World*, U.N. Doc. ST/ESA/372, at 7 (2020); U.N. Hum. Rts. Council, Philip Alston, *Climate Change and Poverty: Report of the Special Rapporteur on Extreme Poverty and Human Rights*, U.N. Doc. A/HRC/41/39 (2019), ¶ 51 (warning of “climate apartheid”).

3. See, e.g., Carmen G. Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 LOY. L. REV. 401, 410-413 (2020) [hereinafter Gonzalez, *Migration*].

women,⁴ Indigenous peoples,⁵ youth,⁶ and other historically excluded groups.⁷

Even as the urgency of the challenge crystalizes, legal and political strategies remain fragmented. In the political hallways where the rule of law is fashioned, the debates remain largely staid and conventional. Conversations focus on questions of carbon taxes and cap-and-trade regimes, bridge fuels, nuclear lifespans, and technological fixes.⁸ Outside the hallways of power, however, different conversations are taking place, different voices are being raised, and different visions of the rule of law are being advanced.⁹ At their core, these visions seek to harness the rule of law as a tool not just for sustaining the norm, but instead for engaging inevitable disruption as an opportunity to reimagine and reconfigure the conversations around climate change. The ideas being advanced are often in line with swelling social movements focused on gender,

4. See, e.g., Lisa Benjamin & Adelle Thomas, *Gender and Climate Justice - Implications for Policy Formation in the Caribbean Region*, 66 LOY. L. REV. 329, 366 (2020).

5. See, e.g., CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES (Randall S. Abate & Elizabeth Ann Kronk eds., 2013); Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1635-46 (2007). See also Deborah McGregor, *Indigenous Environmental Justice and Sustainability*, in THE CAMBRIDGE HANDBOOK OF ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT 58 (Sumudu A. Atapattu, Carmen G. Gonzalez & Sara L. Seck eds., 2021).

6. See, e.g., First Amended Complaint for Declarative and Injunctive Relief at 92, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. Sept. 10, 2015) [hereinafter *Juliana Amended Complaint*]; Jonathan Lovvorn, *Special Preview: Climate Change Beyond Environmentalism Part I: Intersectional Threats and the Case for Collective Action*, 29 GEO. ENV'T L. REV. 1, 33-36 (2016).

7. See Intergovernmental Panel on Climate Change [IPCC], Summary for Policymakers, in *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* § B.5.1 (2018) [hereinafter 2018 IPCC Report].

8. See, e.g., American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009) (proposing, among other things, a cap-and-trade system that would limit the total amount of greenhouse gases that can be emitted nationally); Stemming Warming and Augmenting Pay Act of 2019, H.R. 4058, 116th Cong. (2019) (proposing to impose a tax on combusted fossil fuel greenhouse gas emissions beginning in 2021).

9. See, e.g., United Nations Convention on the Rights of the Child, Nov. 20, 1989 1577 U.N.T.S. 3; Joyeeta Gupta, *Climate Change: A GAP Analysis Based on Third World Approaches to International Law*, 53 GERMAN Y.B. INT'L L. 341 (2010); Tracy-Lynn Humby, *Evaluating the Value of TWAIL, Environmental Justice, and Decolonization Discourses as Framing Lenses for International Environmental Law*, 26 TRANSNAT'L L. & CONTEMP. PROBS. 317 (2017); Kevin Samy, *Women and Climate Change: An Opportunity to Address Gender Inequality*, 6 YALE J. INT'L AFF. 99 (2011); Elizabeth Ann Kronk Warner, *Indigenous Adaptation in the Face of Climate Change*, 21 J. ENV'T & SUSTAINABILITY L. 129 (2015) [hereinafter Warner, *Indigenous*].

racial, social, and economic equality. These reimagined visions for a climate-changed society, and for the role of the rule of law in society, are being advanced in varying forms around the world. This article centers and engages these visions, focusing on the United States.

In doing so, this article reveals how path dependency in the development of environmental law constrains how we think of and use environmental law. It then considers broader visions for environmental law that engage with questions of power and inequality in society. This reimagining of environmental law reconnects the field with its interdependency-oriented ecological roots while also situating it more squarely in conversation with other law reform projects.

The reimagining of environmental law that this article advances is already underway.¹⁰ From the local to the global level, movements are afoot to advance deeper and more inclusive and intersectional approaches to addressing environmental challenges. Largely, however, those leading the conversation are not our political leaders or lawmakers. With few exceptions, the political leaders in the halls of power around the world lead tepidly, if at all, on matters of great importance, including climate change. Nowhere is this truer than in the United States where, with few exceptions, high-level leadership on climate change has been woefully lacking.¹¹ Even in moments where our leaders have sought to be bold, they have failed to harness the power and influence available to them to advance and undergird our democracy for present and future generations. Notable political leaders, including President Obama, Vice President Gore, Secretary Kerry, Senator Edward Markey, Senator Bernie Sanders, and, now, President Biden, have all sought to lead on climate change, but that

10. See, e.g., generally Clifford J. Villa, *Remaking Environmental Justice*, 66 LOY. L. REV. 469 (2020); Inara Scott et. al., *Environmental Law. Disrupted*, 49 ENV'T L. REP. NEWS & ANALYSIS 10038 (2019); Jedediah Purdy, *The Long Environmental Justice Movement*, 44 ECOLOGY L.Q. 809, 809 (2018) [hereinafter Purdy, *Environmental Justice*] (suggesting “the existence of a ‘long environmental justice movement’ that, like the long movements for racial equality and labor organizing, put questions of economic power and distribution, democracy, and workplaces and neighborhoods at the center of environmental politics for many decades before the watershed era of environmental law making, 1970–77.”).

11. See *infra* Part IV(C) for a discussion of how the dynamics of political leadership are changing. See also Cinnamon Carlarne, *U.S. Climate Change Law: A Decade of Flux and an Uncertain Future*, 69 AM. U. L. REV. 387, 402–39 (2019) [hereinafter Carlarne, *Decade of Flux*] (discussing U.S. environmental policies under both President Obama and President Trump); Cinnamon Carlarne, *Notes From a Climate Change Pressure-Cooker: Sub-Federal Attempts at Transformation Meet National Resistance in the USA*, 40 CONN. L. REV. 1351, 1354–64 (2008) (discussing U.S. environmental policies during the late 1900s and early 2000s, particularly the policies of President George W. Bush).

leadership has yet to bring about transformative change.¹² Moreover, for every ounce of courage these leaders have shown, they are confronted ten-fold not just with political resistance, but with outright rejection of science and climate change by their fellow lawmakers.¹³ The thinness of leadership confronted by the outsized and unabashed degree of science denial,¹⁴ mockery of cooperation, and economic collusion mean that there has not just been an abdication of leadership, but outright hostility and brazen opposition to virtually any action on climate change.¹⁵ The same holds true for substantive changes to the larger body of federal environmental law.

Simply put, with very limited exceptions, Congress has failed to adopt or substantively amend federal environmental legislation for more than thirty years.¹⁶ Domestic law on the environment is stale and is only still evolving due to the work of administrative agencies,¹⁷

12. See Carlarne, *Decade of Flux*, *supra* note 11, at 404.

13. See Alana Wise, 'I Don't Think Science Knows': Visiting Fires, Trump Denies Climate Change, NPR NEWS (Sept. 14, 2020, 5:47 PM), <https://www.npr.org/2020/09/14/912799501/i-don-t-think-science-knows-visiting-fires-trump-denies-climate-change>; Juliet Eilperin & Brady Dennis, *How James Inhofe is Upending the Nation's Energy and Environmental Policies*, WASH. POST (Mar. 14, 2017), https://www.washingtonpost.com/national/health-science/how-james-inhofe-is-upending-the-nations-energy-and-environmental-policies/2017/03/14/2bebdbfa-081c-11e7-a15f-a58d4a988474_story.html; Ari Drennen & Sally Hardin, *Climate Deniers in the 117th Congress*, CENTER FOR AMERICAN PROGRESS (Mar. 30, 2021), <https://www.americanprogress.org/issues/green/news/2021/03/30/497685/climate-deniers-117th-congress/> ("there are still 139 elected officials in the 117th Congress, including 109 representatives and 30 senators, who refuse to acknowledge the scientific evidence of human-caused climate change.").

14. *The Climate Denial Machine: How the Fossil Fuel Industry Blocks Climate Action*, THE CLIMATE REALITY PROJECT (Sept. 5, 2019, 3:12 PM), <https://www.climateactproject.org/blog/climate-denial-machine-how-fossil-fuel-industry-blocks-climate-action>.

15. See Aaron Sayne, *The Proof is in the Politics: Fossil Fuel Interests and Domestic Energy Transitions*, NAT. RES. GOVERNANCE INST. (May 21, 2020), <https://resourcegovernance.org/blog/proof-politics-fossil-fuel-interests-and-domestic-energy-transitions>; Mark Maslin, *The Five Corrupt Pillars of Climate Change Denial*, THE CONVERSATION (Nov. 28, 2019, 8:00 AM), <https://theconversation.com/the-five-corrupt-pillars-of-climate-change-denial-122893>; *The Climate Denial Machine: How the Fossil Fuel Industry Blocks Climate Action*, THE CLIMATE REALITY PROJECT (Sept. 5, 2019, 3:12 PM), <https://www.climateactproject.org/blog/climate-denial-machine-how-fossil-fuel-industry-blocks-climate-action>; Sheldon Whitehouse & Jared Huffman, *The Green New Deal Vote Shows Republicans Would Rather Mock Climate Change than Challenge Big Lobbying Groups*, NBC NEWS (Nov. 28, 2019, 8:00 AM), <https://www.nbcnews.com/think/opinion/green-new-deal-vote-shows-republicans-would-rather-mock-climate-cnca987486>.

16. The primary exceptions to Congressional inaction since the mid-1990s are the 2016 amendments to the Toxic Substances Control Act. Toxic Substances Control Act of 1976, 15 U.S.C. ch. 53, subch. II-IV (2018).

17. See, e.g., Courtney R. McVean & Justin R. Pidot, *Environmental Settlements and Administrative Law*, 39 HARV. ENV'T L. REV. 191 (2015); Michael C. Blumm & Andrea Lang,

the courts,¹⁸ and civil society. Where our statespeople were once leaders in shaping the rule of law, they are now, at best, laggards.

Over the decade from 1970 to 1980, driven by a powerful environmental social movement,¹⁹ Congress constructed the backbone of domestic environmental law²⁰ and created legal models that countries worldwide have replicated.²¹ Yet, in Congress' hands, over the past three decades, federal environmental law has stood still, and climate law has remained dormant.²²

Despite persistent political inertia, rapid and sustained legal change is possible. This has proven true in critical moments in our

Shared Sovereignty: The Role of Expert Agencies in Environmental Law, 42 *ECOLOGY L.Q.* 609 (2015).

18. See, e.g., *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007) (holding that carbon dioxide and other greenhouse gases are air pollutants under the Clean Air Act and can be regulated by the EPA). See also Cinnamon Carlarne, *Climate Creep*, 52 *ENV'T L. REP.* 5 (2022) (examining two competing trends in climate law development in the United States – the steady development of climate-related legal and political measures versus countermeasures designed to undercut the emerging rule of law around climate change. The article argues that, despite the lack of climate-specific legislation, there is a growing body of law that advances efforts to limit climate change and limits the ability to undercut legal progress and suggests that the decision by the Court to hear the *West Virginia v. EPA* case is out-of-step with the trajectory of legal development in the United States.)

19. See, e.g., Jedediah Britton-Purdy, *Environmentalism Was Once a Social-Justice Movement: It Can Be Again*, *THE ATLANTIC* (Dec. 7, 2016), <https://www.theatlantic.com/science/archive/2016/12/how-the-environmental-movement-can-recover-its-soul/509831/>; Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 *U. PA. L. REV.* 85, 86 (2001) (“Beginning around the early 1970s, however, the environmental movement began to transform both law and society. Congress created a large web of new federal environmental legislation along with new rights for citizens and environmental groups to file suits to enforce government regulation.”).

20. E.g., National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370 (2018); Clean Air Act of 1970, 42 U.S.C. §§ 7401–7671 (2018); Clean Water Act of 1972, 33 U.S.C. §§ 1251–1388 (2018); Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1423 (2018); Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2018); Safe Drinking Water Act of 1974, 42 U.S.C. §§ 300f–300j (2018); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992 (2018); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2018).

21. See, e.g., Carmen Luz de la Maza, *NEPA's Influence in Developing Countries: The Chilean Case*, 21 *ENV'T IMPACT ASSESSMENT REV.* 169 (2001); *EIA in the US, the UK and Europe*, *INST. OF ENV'T MGMT. & ASSESSMENT* (Jan. 24, 2014), <https://transform.iema.net/article/eia-us-uk-and-europe>.

22. See Kelly S. Gallagher, *We Need a US Climate Law*, *THE HILL* (Apr. 9, 2021, 3:30 PM), <https://thehill.com/opinion/energy-environment/546809-we-need-a-us-climate-law>; Nadja Popovich et al., *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List*, *N.Y. TIMES* (Jan. 20, 2021), <https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html>. See also Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth Century Synthesis*, 129 *YALE L.J.* 1784 (2020).

democracy. In those moments, political leaders ushered in—finally—the abolition of slavery,²³ the vote for women,²⁴ rights for laborers,²⁵ the Civil Rights Act,²⁶ the Disability Rights Act²⁷, and the Clean Air Act.²⁸ Of course, while Congress ultimately passed the bills, the true warriors for change were the abolitionists, the suffragettes, the environmental, civil rights, labor, and disability rights activists who labored long and hard, often risking their families, their jobs, and even their lives, to elevate the issues to the point of legal recognition.

We are in a political moment when faith in the ability of our democratic system – and the willingness of Congress – to leverage the rule of law to address the greatest challenges of our time has eroded to the point of collapse. It is not irrevocably destroyed, but bold change is needed to reinvigorate our democracy. In this “moment of possibility,” even as we continue to look to our lawmakers and statespeople to lead with courage and conviction, we must expand our vision of leadership outward.²⁹ Nowhere is this more critical than in the context of climate change. Climate change threatens to destabilize society and exacerbate existing patterns of inequality. It also creates opportunities to disrupt persistent patterns of inequality and effect positive systemic changes as we pursue pathways for just and sustainable transition.³⁰

At this moment of reckoning, a diverse group of actors coalescing around notions of intersectional climate justice are propelling the law forward.³¹ They are mobilizing social movements that offer new ways

23. U.S. CONST. amend. XIII, § 1.

24. U.S. CONST. amend. XIX.

25. National Labor Relations Act of 1935, 29 U.S.C. §§ 151–169 (2018).

26. Civil Rights Act of 1964, 42 U.S.C. §§ 1981–2000 (2018).

27. Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2018).

28. Clean Air Act of 1970, 42 U.S.C. §§ 7401–7671 (2018).

29. See Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 830 (2021) (“We are living in a moment of possibility—where the failures of the state to provide for people are plain and grassroots contestation of the status quo is stronger than it has been in decades. As scholars, we have an opportunity to respond to today’s crises in ways that move us toward more justice and liberation for more people.”).

30. E.g., Joel B. Eisen & Shelley Welton, *Clean Energy Justice: Charting an Emerging Agenda*, 43 HARV. ENV’T L. REV. 307 (2019); Ann M. Eisenberg, *Just Transitions*, 92 S. CAL. L. REV. 273 (2019).

31. See, e.g., Carmen G. Gonzalez, *Climate Justice and Climate Displacement: Evaluating the Emerging Legal and Policy Responses*, 36 WIS. INT’L L.J. 366 (2019) [hereinafter Gonzalez, *Climate Justice*]; Jonathan Lovvorn, *Climate Change Beyond Environmentalism Part I: Intersectional Threats and the Case for Collective Action*, 29 GEO. ENV’T L. REV. 1 (2016) [hereinafter Lovvorn, *Climate Change*]; Carmen G. Gonzalez, *Bridging the North-South Divide: International Environmental Law in the Anthropocene*, 32 PACE ENV’T L. REV. 407 (2015)

of imagining the world and harnessing the power and possibilities of the rule of law.³² This article engages with the ongoing fight over the future of environmental and climate law. It makes a case for a more inclusive vision of environmental law – how we make it, how it operates, and whose interests it represents.

The article proceeds as follows. Part II disentangles the roots of U.S. environmental law to understand how the field emerged and evolved alongside but largely detached from other contemporary law reform movements. Part III then examines how the international environmental movement, domestic environmental justice movement, and the emerging climate justice and environmental rights movements are prompting a critical reassessment of the subjugating and redemptive capacity of environmental and climate law. Part IV explores how intersecting crises are spawning a new generation of leaders who are unleashing more inclusive visions of life under and beyond the rule of law. The visions for the future that these movements offer are fueling law reform revolutions—like racial and social justice revolutions³³ and income inequality revolutions³⁴—that are as powerful as they are (for now) peaceful. Here, focusing on climate change, environmental law, and environmental justice, the article offers a glimpse into the many and varied voices that are shaping new visions for the rule of law. Part V concludes.

[hereinafter Gonzalez, *Bridging the North-South Divide*]; Sumudu Atapattu, *Climate Change and Displacement: Protecting 'Climate Refugees' Within a Framework of Justice and Human Rights*, 11 J. HUM. RTS. & ENV'T. 86 (2020). See also Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) [hereinafter Harris, *Race and Essentialism*].

32. While this paper centers on the rule of law, alternative visions de-center the rule of law and advocate for a more decentralized form of self-governance. This article in no way seeks to undermine these accounts, but rather to focus on the ways in which law can be more equitably and effectively mobilized at a moment when we are deeply engaged in the process of leveraging law to address climate change. See, e.g., Amna Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 411 (2018) (discussing the “central dilemma of liberal law reform projects, caught between a commitment to the rule of law and status quo arrangements on the one hand, and the desire for substantive justice and social, economic, and political transformation on the other.”).

33. See, e.g., Amna Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90 (2020) [hereinafter Akbar, *Demands*]; Linda S. Greene et al., *Talking About Black Lives Matter and #MeToo*, 34 WIS. J.L. GENDER, & SOC'Y 109 (2019); Tala Doumani & Jamil Dakwar, *Rubber Bullets and the Black Lives Matter Protests*, 24 HUM. RTS. BRIEF 77 (2021); Kristin Kalsem & Verna L. Williams, *Social Justice Feminism*, 18 UCLA WOMEN'S L.J. 131 (2010).

34. See, e.g., Ari Glogower, *Taxing Inequality*, 93 N.Y.U. L. REV. 1421 (2018); Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717 (2020).

II. THE MAKING OF ENVIRONMENTAL LAW

There was a time when the United States led the world in developing environmental law. During a time of great social and environmental upheaval, the American people and Congress shared a vision for change. This vision was driven by a powerful social movement and premised on securing a healthy environment conducive to supporting human health and ecosystems capable of sustaining biodiversity. The birth of federal environmental law in the United States was, without hyperbole, epic. Despite earlier, soft efforts to lay placeholders,³⁵ until 1969, the federal government had largely ceded the terrain to the states. That changed in the 1970s, when Congress adopted, in rapid-fire action, among other environmental laws:

The National Environmental Policy Act (1970);
The Clean Air Act (1970);
The Federal Insecticide, Fungicide and Rodenticide Act (1972);
The Clean Water Act (1972);
The Marine Mammal Protection Act (1972);
The Endangered Species Act (1973);
The Safe Drinking Water Act (1974);
The Hazardous Materials Transportation Act (1975);
The Resource Conservation and Recovery Act (1976);
The Toxic Substances Control Act (1976);
Amendments to the Clean Air Act & the Clean Water Act (1977); and
The Comprehensive Environmental Response and Compensation Liability Act (CERCLA).

The herculean effort required to structure and implement this ambitious legal regime in such a short period cannot be understated.³⁶ This was truly “the environmental decade.”³⁷ Today, it

35. See, e.g., Air Pollution Control Act of 1955, Pub. L. No. 84-159 (later amended and rewritten as the Clean Air Act of 1970); Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845 (later amended and rewritten as the Clean Water Act of 1972).

36. See Richard N. L. Andrews, *The EPA at 40: An Historical Perspective*, 21 DUKE ENV'T L. & POL'Y F. 223 (2010); William D. Ruckelshaus, *EPA*, 16 EPA J. 14 (1990); William K. Reilly, *A Perspective From EPA*, 16 EPA J. 12 (1990); William D. Ruckelshaus, *A Challenge to EPA*, 6 EPA J. 6 (1980); Jack E. Ravan, *A State/EPA Partnership*, 10 EPA J. 9 (1984).

37. LETTIE M. WENNER, *THE ENVIRONMENTAL DECADE IN COURT* 15-19 (1982). See also

is difficult to fathom Congress passing any one of these groundbreaking laws, much less a dozen.³⁸

This was a period of great legal innovation and leadership. The laws were well-intentioned but imperfect, and the pace of implementation failed to keep up with expectations. Nonetheless, it is worth pausing to bear witness to the sheer amount of legal development that Congress accomplished. Environmental law exploded onto the scene and forever changed the way we think about human-environmental interactions, and the role of law in this regard. Despite such a great surge of optimistic lawmaking, the field of environmental law is still maturing and “coming of age.”³⁹ The rapid burst of activity was followed by decades of sluggish supplementation, inconsistent implementation, and persistent political fighting.

The boom-and-bust nature of environmental lawmaking in the United States creates a sense of cognitive dissonance. Lawmakers carved out this space as demanding urgent legal response and created a sophisticated set of rules and tools for addressing environmental challenges. They then abandoned the field to incremental development through judicial and administrative rulemaking even as the scale of the environmental challenges expanded and understanding grew of the degree to which environmental degradation undermines human health and well-being.⁴⁰ Moreover, the laws that exist are not only outdated but also, as will be discussed, frequently myopic in focus. This all leads to the question of whether environmental law is, or ever was, “fit for

Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 YALE L.J. 1122 (2010).

38. See David M. Uhlmann, *The Quest for a Sustainable Future and the Dawn of a New Journal at Michigan Law*, 1 MICH. J. ENV'T & ADMIN. L. 1, 5 (2012) (“During the course of the 1970s and 1980s, more than two dozen environmental and natural resource statutes were enacted by Congress. Most passed with nearly unanimous support—margins that would be unthinkable today—and many were signed into law by Republican presidents.”).

39. Elizabeth Fisher, Bettina Lange, Eloise Scotford & Cinnamon Carlarne, *Maturity and Methodology: Starting a Debate About Environmental Law Scholarship*, 21 J. ENV'T L. 213, 213–50 (2009). See also Dan. A. Tarlock, *Is There a There There in Environmental Law?*, 19 J. LAND USE & ENV'T L. 213 (2004); Carol M. Rose, *Environmental Law Grows Up (More or Less), and What Science Can Do to Help*, 9 LEWIS & CLARK L. REV. 273 (2005).

40. See Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 5–8 (2014) (“Congress has not passed a major environmental statute in nearly a quarter-century, nor has it produced more than incremental reforms to federal energy legislation during that time, despite dramatic technological, economic, and social changes in these fields that would seem to demand a legislative response.”).

purpose.”⁴¹

This section explores the development of environmental law to determine the fitness of the field for tackling an increasingly complex set of problems that are inexorably tied to some of the greatest political and socioeconomic challenges of our time. It begins by tracing environmental law’s origin story. I argue that environmental law emerged from a rich understanding of social and ecological systemic interdependency but quickly became detached from its ecological roots and never truly intertwined with parallel law reform projects. This origin story helps us understand why environmental law operates in the ways that it does, and how it can evolve to reattach to its ecological roots and rise to the challenge of climate change.⁴²

A. *How It Began: Environmental Law’s Ecological Roots*

“Everything is connected to everything else.”⁴³ This insight

41. Lavayana Rajamani & Jacqueline Peel, *Introduction*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 28–29 (2d ed., 2021).

42. As this article explores, we are now witnessing a return to the power of social movements in line with the popular movements of the 1960s that gave rise to the environmental, civil rights, labor, disability, women’s rights movements, and more. *See* Akbar, Ashar & Simonson, *supra* note 29, at 824 (2021) (“It has never been clearer how ideas birthed in and by social movements are fundamental forces in law and politics in the United States.”). Many of these movements have older and deeper origins, but in the 1960s and 1970s, many social movements gained power and momentum, resulting in the leveraging of law and policy to important law reform projects. Each of those movements have made significant progress towards advancing their respective goals but have yet to achieve the kind of deep structural change that the movements envisioned half a century ago. For discussions of this in the context of constitutional law, writ large, and in the context of LGBTQIA+ rights, see Ruth Colker, *The White Supremacist Constitution*, UTAH L. REV. (forthcoming 2022) (arguing that the Constitution has, in every era, furthered white supremacy and should be seen as a barrier to progressive change); Marc Spindelman, *Masterpiece Cakeshop’s Homiletics*, 68 CLEV. ST. L. REV. 347 (2020); Marc Spindelman, *Obergefell’s Dreams*, 77 OHIO ST. L.J. 1039 (2016). What we are witnessing now is a revitalization and a deepening of these movements. Only, unlike the 1960s and 1970s, these movements are increasingly moving in solidarity as they recognize that their roots and objectives are, at times, complexly intertwined. *See, e.g.*, Gonzalez, *Migration*, *supra* note 3, at 408 (“An analysis of climate change through the framework of racial capitalism reveals that the domination of nature and the dispossession and exploitation of racialized human beings are deeply inter-connected.”); Dana R. Fisher, *Why Are We Here? Patterns of Intersectional Motivations Across the Resistance*, 23 MOBILIZATION: AN INT’L Q. 451 (2018); Kishi Animashaun Ducre, *The Black Feminist Spatial Imagination and an Intersectional Environmental Justice*, 4 ENV’T SOC. 22 (2018); Naomi Mumbi Maina-Okori et al., *Reimagining Intersectionality in Environmental and Sustainability Education: A Critical Literature Review*, 49 J. OF ENV’T EDUC. 286 (2018); Lincoln L. Davies, *Lessons for an Endangered Movement: What a Historical Juxtaposition of the Legal Response to Civil Rights and Environmentalism Has to Teach Environmentalists Today*, 31 ENV’T. L. 229 (2001).

43. BARRY COMMONER, THE CLOSING CIRCLE 29 (2020) [hereinafter COMMONER,

informs the fields of ecology and conservation biology, and, by extension, much of environmental law.⁴⁴ From its earliest days, ecology has taught us that living things are interdependent and form component parts of complex ecosystems.⁴⁵ In his ecological masterpiece, *On the Origin of Species*, Charles Darwin described this interdependence as flora and fauna coexisting and depending upon each other in a “entangled bank.”⁴⁶ The vision of species and systemic interdependence that ecology offers depicts a world where humans are not only component parts of complex ecosystems, but central actors influencing the health and stability of those systems and the species (human and non-human) that rely upon them. We both shape and are shaped by the ecosystems within which we exist.

In her pioneering 1962 book, *Silent Spring*,⁴⁷ renowned scientist Rachel Carson offered an alarming view of what can happen when humans acquire the power to alter nature and use this power in ways that permanently disrupt ecosystems.⁴⁸ In the case of *Silent Spring*, the disruptive force that blanketed the mythical town with a “strange blight” that silenced birds, sickened animals, and killed humans was the widely used pesticide DDT.⁴⁹ Carson’s fictionalized depiction of the pervasive negative effects that one man-made chemical can have on the environment portrayed to the public a vision of environmental pollution that instilled fear, but also prompted change.

In his path-breaking 1971 book, *The Closing Circle*, renowned ecologist, Barry Commoner built off Carson’s ecological visions and offered four “laws of ecology”: (1) everything is connected to everything else; (2) everything must go somewhere; (3) nature knows best; and (4) there is no such thing as a free lunch.⁵⁰ In laying out these laws, he offered a glimpse into the social, political, and economic systems that give rise to patterns of environmental

CLOSING CIRCLE]. See also Chris Cuomo, *On Ecofeminist Philosophy*, 7 ETHICS & THE ENV’T 1 (2002).

44. See, e.g., Michael E. Soulé, *What Is Conservation Biology?*, 35 BIOSCIENCE 727 (1985).

45. See Carl F. Jordan, *What Is Ecology?*, 56 BULLETIN OF THE ECOLOGICAL SOC’Y OF AMERICA 2, 2–3 (1975).

46. CHARLES DARWIN, ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION 489 (1859).

47. RACHEL CARSON, SILENT SPRING (1962).

48. For an overview of shifting theories of ecology, see, e.g., Carl Folke et al., *Regime Shifts, Resilience, and Biodiversity in Ecosystem Management*, in FOUNDATIONS OF ECOLOGICAL RESILIENCE 119, 142 (Lance H. Gunderson et al. eds., 2009).

49. CARSON, *supra* note 47, at 1–2.

50. COMMONER, CLOSING CIRCLE, *supra* note 43, at 29, 33–48.

degradation and perpetuate ecological crisis. Commoner expanded the vision of ecology beyond the interconnections among natural systems to depict the links between natural and human systems. He called “attention to the parallels among the environmental, civil rights, labor and peace movements” and linked “the environmental crisis to the problems of poverty, injustice, racism, public health, national security and war.”⁵¹ Highlighting the deep interconnectedness of humans and the natural environment, Commoner warned:

When any environmental issue is pursued to its origins, it reveals an inescapable truth – that the root cause of the crisis is not to be found in how men interact with nature, but in how they interact with each other – that, to solve the environmental crisis we must solve the problems of poverty, racial injustice and war.⁵²

Speaking at a time of great social upheaval, Commoner’s message reflected the mood of a country emerging from the fires of war and protest and confronting the realities of a society increasingly torn asunder along lines of race, gender, and class. The undertones of his message resonated deeply, but not widely. As the subsequent development of the mainstream environmental movement showed, his rules of ecology were easier understood and accepted when detached from their deeper and more contentious social context.

The lessons Carson and Commoner offered, alongside televised images of oil-slicked birds on the beaches of Santa Barbara,⁵³ the Cuyahoga on fire,⁵⁴ and Los Angeles blanketed in smog,⁵⁵ helped launch the environmental movement of the 1960s, which culminated

51. Peter Dreier, *Remembering Barry Commoner*, THE NATION (Oct. 1, 2012), <https://www.thenation.com/article/archive/remembering-barry-commoner/>.

52. Barry Commoner, Lecture on Ecology and Social Action Given in Berkeley, California (Mar. 15, 1973), <https://climateandcapitalism.com/2011/12/20/barry-commoner-ecology-and-social-action/> [hereinafter Commoner, Lecture].

53. Jon Hamilton, *How California’s Worst Oil Spill Turned Beaches Black and the Nation Green*, NPR NEWS (Jan. 28, 2019), <https://www.npr.org/2019/01/28/688219307/how-californias-worst-oil-spill-turned-beaches-black-and-the-nation-green>.

54. Lorraine Boissoneault, *The Cuyahoga River Caught Fire at Least a Dozen Times, but No One Cared Until 1969*, SMITHSONIAN MAGAZINE (June 19, 2019), <https://www.smithsonianmag.com/history/cuyahoga-river-caught-fire-least-dozen-times-no-one-cared-until-1969-180972444/>.

55. Rian Dundon, *Photos: L.A.’s Mid-Century Smog was so Bad, People Thought it was a Gas Attack*, TIMELINE (May 23, 2018), <https://timeline.com/la-smog-pollution-4ca4bc0cc95d>.

with the first Earth Day in 1970. This movement was dynamic and powerful and fueled unprecedented legal reform.

Modern environmental law burst forth in 1969 with an optimistic and ambitious vision of harmonious coexistence. The first modern environmental law, the National Environmental Policy Act (NEPA) of 1969, declared it to be national policy:

To encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation . . .⁵⁶

NEPA embraced the lessons of ecology and the interconnectedness of “man and his environment.”⁵⁷ Despite this optimistic vision of harmony, the equity issues that Commoner, the civil rights, and feminist movements of the 1960s and 1970s were calling attention to were never centered in either NEPA or the larger body of environmental law. Nonetheless, NEPA initiated a new era in lawmaking in which environmental considerations form an essential part of governmental decision-making processes.

NEPA signaled the beginning of modern environmental law. Legal developments that followed, however, frequently failed to respond to ecology’s core insight about complex systemic interdependencies, or to the structural inequalities surfacing under the law reform projects of the era. From the outset, environmental law detached itself from these other law reform projects, creating its own closed, increasingly technocratic law-making system.⁵⁸

As the field of federal environmental law grew through the creation of the Environmental Protection Agency (EPA) in 1970,⁵⁹

56. National Environmental Policy Act §§ 4321–4370 (1982 & Supp. V 1987).

57. *Id.*

58. Part IV discusses in detail how the environmental and climate justice movements have offered consistent critique and pushback against “mainstream environmentalism”, but it is worth noting that other streams of thought have also offered insight into the shortcomings of environmental decision-making and pushed for more ecologically oriented thinking. This is exemplified by the rich body of scholarship on ecosystem services. See Keith H. Hirokawa & Elizabeth J. Porter, *Aligning Regulation with the Informational Need: Ecosystem Services and the Next Generation of Environmental Law*, 46 AKRON L. REV. 963, 987 (2013); J.B. Ruhl & James Salzman, *The Law and Policy Beginnings of Ecosystem Services*, 22 J. LAND USE & ENV’T L. 157 (2007).

59. H.R. MISC. DOC. NO. 91-364 (1970).

and the adoption of laws such as the Clean Air Act (1970),⁶⁰ the Clean Water Act (1972),⁶¹ and the Endangered Species Act (1973),⁶² it evolved to focus on discrete causal pathways between human health and environmental degradation and between economic and environmental interests. Environmental law thus emerged in a fragmented manner, with each new law creating insular media-specific regimes.⁶³ The laws that were developed during the heyday of domestic environmental law in the 1970s are characterized by their ambition and their efforts to engage with science, prompt technological innovation, and promote human health and economic well-being. However, they are also characterized by their narrow focus on distinct environmental challenges and technological solutions to these challenges. As Amy Wildermuth describes, breaking down environmental problems by media (e.g., air, water, waste) made the issues “more manageable for Congress in passing statutes” and fit “better with the typical specialization of environmental scientists and engineers as well as the agencies administering these statutes.”⁶⁴ As a result, environmental law necessarily developed along narrow channels. One of the primary costs of this rapid and specialized development is that environmental law often “fail[s] to see that the environment is an interconnected whole.”⁶⁵

Moreover, the emerging legal frameworks offered little space for responding to the inequitable distribution of environmental harms.⁶⁶ Instead, these regimes increasingly reflected the predominantly white, male, middle-class roots and interests of the environmental

60. Clean Air Act of 1970, 42 U.S.C. §§ 7401-7671q (amended 1990).

61. Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251-1387 (amended 1987).

62. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544.

63. Amy J. Wildermuth, *Is Environmental Law a Barrier to Emerging Alternative Energy Sources?*, 46 IDAHO L. REV. 509, 522–23 (2010) (“environmental law is *fragmented and media specific*. Environmental statutes usually focus on particular media, such as water, or pollutants, which means that environmental problems tend to be broken into discrete pieces and parts.”).

64. *Id.*

65. *Id.* See also Eric T. Freyfogle, *The Ethical Strands of Environmental Law*, 1994 U. ILL. L. REV. 819, 845 (1994) (“We have many words that break nature into parts and treat it as a collection of resources, but few words to portray it as a seamless web.”).

66. *E.g.*, Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 625, 627 (1992) (“In fact, race plays perhaps a more significant role than poverty in the siting of environmentally dangerous facilities.”).

organizations and lawmakers pushing for action.⁶⁷ According to prominent environmental sociologist and environmental justice advocate Dorceta Taylor, the most influential environmental organizations “grew increasingly big, bureaucratic, hierarchical, and distant from local concerns and politics,” with “men dominat[ing] the top leadership positions in reform environmental organizations.”⁶⁸ Similarly, male voices dominated the development of environmental legal theory, a field frequently described as originating with the help of its “founding fathers.”⁶⁹ Thus, even as environmental law thrived during its early years, it did so in isolation from the increasingly tangled web of social justice challenges ushered in by parallel social movements and law reform projects.

B. *How It Is Going: A Field Detached*

Even staying in its own lane, by the mid-1980s, environmental law struggled to maintain forward momentum. The optimism and visions of harmony that shaped environmental law’s auspicious birth quickly faded amidst the social and political realities of the emerging hyper-capitalism of the 1980s and 1990s.⁷⁰ Environmental law became a terrain of scrappy backroom bureaucratic fighting where every effort to curb pollution, protect individual species, or clean up

67. See DORCETA E. TAYLOR, *THE RISE OF THE AMERICAN CONSERVATION MOVEMENT: POWER, PRIVILEGE, AND ENVIRONMENTAL PROTECTION* (2016).

68. Dorceta E. Taylor, *Race, Class, Gender, and American Environmentalism*, USDA, GEN. TECH. REP. PNW-GTR-534, 10-11 (2002), <https://www.fs.fed.us/pnw/pubs/gtr534.pdf> [hereinafter Taylor, *Race, Class, Gender*]. See also Jeremy P. Jacobs, Nick Sobczyk & Timothy Cama, “Overwhelmingly White” Green Groups Forced to Confront Past, E&E NEWS (June 5, 2020, 1:27 PM), <https://www.eenews.net/stories/1063327335>; Jedediah Purdy, *Environmentalism’s Racist History*, THE NEW YORKER (Aug. 13, 2015), <https://www.newyorker.com/news/news-desk/environmentalisms-racist-history>. The same held true in the political arena where the first seven administrators of the EPA were men and, until President Biden appointed Michael Regan in 2021, only one administrator, Lisa Jackson (2009-2013), was a person of color. *Chronology of Administrators*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/history/chronology-epa-administrators> (last visited May 17, 2021).

69. See, e.g., Eric A. Goldstein, *David Sive and Joe Sax, Titans of Environmental Law: An Appreciation*, NRDC (Mar. 14, 2014), <https://www.nrdc.org/experts/eric-goldstein/david-sive-and-joe-sax-titans-environmental-law-appreciation>. For a discussion of the earlier “founding fathers” of environmentalism, see Barry E. Hill, *Time for a New Age of Enlightenment for U.S. Environmental Law and Policy: Where Do We Go From Here?*, 49 ENV’T L. REP. NEWS & ANALYSIS 10362, 10363-64 (2019) (naming Sierra Club founder John Muir the “Father of National Parks” and crediting forester Aldo Leopold as the “Father of Wildlife Ecology”).

70. See Marina Vujnovic, *Hypercapitalism*, in THE WILEY-BLACKWELL ENCYCLOPEDIA OF GLOBALIZATION (2017).

abandoned waste sites involved years of effort, litigation, and concessions. Progress continued, but it was hard-fought and increasingly achieved through the courts and the administrative agencies, not Congress.⁷¹ Little thought, much less legal attention, was given to the racial, gender, or social justice implications of environmental degradation,⁷² or to the potentially subordinating impacts of environmental law itself.⁷³ Instead, environmental law staked out its territory law by law and issue by issue.

For at least the first two decades of modern environmental law, race, gender, and poverty considerations were largely absent from the mainstream narrative, and vice versa.⁷⁴ Gradually, however, the threads of environmental legal theory are intertwining with considerations of race, gender, and economic inequality as climate change and the maturing environmental and climate justice movements catapult environmental law into a mid-life crisis.⁷⁵ Faced with the profound challenges climate change creates, environmental law is being pushed to come full circle to recognize and rethink systemic interdependencies. For anthropocentrically minded environmentalists,⁷⁶ this means recognizing that responding to the

71. For a concise description of the “broadside challenge[s]” federal environmental law contended with (and largely survived) during the 1980s and 1990s, see Richard J. Lazarus, *Fairness in Environmental Law*, 27 ENV’T L. 705, 708 (1997).

72. See, e.g., Cole, *supra* note 66, at 620–21 (“Until recently, mainstream environmental groups have not focused on the environmental problems faced by low-income communities, and poverty lawyers traditionally have not ranked environmental cases highly. Both environmental lawyers and poverty lawyers must begin to address the disproportionate burden of pollution borne by low-income communities. Both must recognize the intersection of their disciplines, and mutually come to practice a new, empowering type of legal advocacy—environmental poverty law—which will challenge both disciplines as they are currently practiced.”). See also Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and “Justice,”* 47 AM. U.L. REV. 221, 222–23 (1997).

73. See, e.g., Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT’L L. 103, 107 (1991) (“debate continues over whether environmental protection aims to enhance human well-being or whether it has broader goals which subordinate short term human needs to the overall protection of nature”). See also Keith H. Hirokawa, *Race, Space, and Place: Interrogating Whiteness Through a Critical Approach to Place* (on file with author).

74. See Angela P. Harris, *Vulnerability and Power in the Age of the Anthropocene*, 6 WASH. & LEE J. ENERGY, CLIMATE & ENV’T 98, 104–05 (2015) [hereinafter Harris, *Vulnerability*] (“With a few notable exceptions, critical legal theorists have concentrated on ‘social justice’ and environmental scholars have concentrated on ‘sustainability,’ with few overlaps in these distinct conversations.”).

75. See Linda A. Malone, *Looking Beyond Environmental Law’s Mid-life Crisis*, 23 PACE ENV’T L. REV. 679 (2006).

76. See Sarah Krakoff, *Mountains Without Handrails ... Wilderness Without*

climate crisis requires responding to structural inequalities; for feminists and racial and economic justice advocates, likewise, this means recognizing that responding to deep systemic inequalities requires responding to the climate crisis and persistent patterns of environmental degradation.⁷⁷

III. EXAMINING THE ROOTS OF ENVIRONMENTAL LAW

Environmental law emerged in response to urgent environmental challenges. So, too, can it evolve. In the 1960s, the country stood on the brink of a series of cumulative environmental disasters. Pollutants contaminated the air, oil and effluent filled our waterways, hazardous waste leaked into schoolyards, and species of flora and fauna disappeared. The scale of disaster demanded a comparable response. Lawmakers heeded that call and rose to the occasion. Today, the nature and scale of the climate crisis eclipses these still ongoing and urgent environmental challenges. It is, as U.N. Secretary General Antonio Guterres suggests, “the defining issue of our time.”⁷⁸

But crisis begets opportunity. The scale of the climate crisis has created the urgency and the opportunity to apprehend and respond to climate change within a broader social context. This requires shifting the gears in environmental law.

Pressure to reform environmental law is intensifying. The sources of pressure are many and varied. The pressure swells from below. It comes from women, youth, Indigenous people, people of color and from a growing group of progressive lawmakers.⁷⁹ These

Cellphones, 27 HARV. ENV'T L. REV. 417, 458 (2003).

77. See, e.g., Nadia Ahmad, *Climate Cages: Connecting Migration, the Carceral State, Extinction Rebellion, and the Coronavirus Through Cicero and 21 Savage*, 66 LOY. L. REV. 293, 299 (2020) (“Migration, climate change, and environmental justice are inextricably linked. We can no longer draw neat borders around environmentalism of white spaces.”); Kate Darling, *A Weight for Water: An Ecological Feminist Critique of Emerging Norms and Trends in Global Water Governance*, 13 MELB. J. INT'L L. 368 (2012); Harris, *Vulnerability*, *supra* note 74. See also Maxine Burkett, *Litigating Separate and Equal: Climate Justice and the Fourth Branches*, 72 STAN. L. REV. ONLINE 145 (2020) [hereinafter Burkett, *Litigating*] (discussing climate cases that intersect with racial discrimination).

78. Press Release, Climate Change ‘Biggest Threat Modern Humans Have Ever Faced’, World-Renowned Naturalist Tells Security Council, Calls for Greater Global Cooperation, U.N. Doc. SC/14445 (Feb. 23, 2021), <https://www.un.org/press/en/2021/sc14445.doc.htm>.

79. See Julia Robertson Hathaway, *Climate Change, the Intersectional Imperative, and the Opportunity of the Green New Deal*, 14 ENV'T COMM'N. 13 (2020); Ramsey Touchberry, *‘The Squad’ Puts Biden on Notice Over Climate Change Action: ‘Keep Your Promise’*, NEWSWEEK (Nov. 19, 2020, 6:20 PM), <https://www.newsweek.com/progressives-put-biden-notice-over-climate-change-action-keep-your-promise-1548872>.

groups do not have the privilege of power on their side. However, they have built and maintained momentum on climate change when the powerful failed to do so.⁸⁰ Increasingly, these “outsider” voices offer a vision of environmental and climate law that seeks to wrestle the rule of law away from being “the darling of the ruling elite” and towards a broader and more inclusive set of interests.⁸¹

The vision, courage, and tenacity of these individuals and the movements they represent has enabled the Biden Administration to speak from the platform that it now occupies—a platform from which the Administration defines climate change as “an intersectional issue” and “a racial justice issue.”⁸² President Biden’s privilege in this fight is due in no small part to the persistent voices of ordinary people who brought this vision of environmental justice into the hallways of power.⁸³ These perspectives emerged in the 1970s with the international environmental movement, and in the 1980s with the Environmental Justice Movement, and have sharpened over time as a result of pressure from the climate justice movement and the environmental rights movement. This part examines how each of these movements pushes against the boundaries of environmental law.

A. *International Environmental Leadership*

As domestic environmental law emerged in the 1970s, environmental concerns were driving legal and social change around the world. From the earliest days of international environmental law, state relations were defined by efforts to balance environmental

80. See Samy, *supra* note 9; Elizabeth D. Gibbons, *Climate Change, Children’s Rights, and the Pursuit of Intergenerational Climate Justice*, 16 HEALTH & HUM. RTS. J. 19 (2014); Bellamy Pailthorp, *Pacific Northwest Tribes Pushing for Climate Action Launch New Political Action Committee*, KNKX (June 19, 2018, 1:59 PM), <https://www.knkx.org/post/pacific-northwest-tribes-pushing-climate-action-launch-new-political-action-committee>; Sarah Kaplan, *The Climate Crisis Spawned a Generation of Young Activists. Now They’re Voters*, WASH. POST (Oct. 30, 2020, 3:56 PM), <https://www.washingtonpost.com/climate-environment/2020/10/30/young-voters-climate-change/>.

81. UGO MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* 13 (2008).

82. The White House, *Gina McCarthy Talks About the Intersectionality of Climate Change*, YOUTUBE (Jan. 30, 2021), <https://www.youtube.com/watch?v=z9RfN375QDI>.

83. See Somini Sengupta, *Big Setbacks Propel Oil Giants Toward a ‘Tipping Point’*, N.Y. TIMES (May 29, 2021), <https://www.nytimes.com/2021/05/29/climate/fossil-fuel-courts-exxon-shell-chevron.html> (discussing the more far-reaching effects of persistent advocacy on court rulings and corporate shareholder decisions to reduce fossil fuel production).

goals—frequently advanced by developed countries—with the economic development and poverty alleviation objectives dominating the agendas of developing countries.⁸⁴

While international environmental law nominally bears witness to the disparate needs of developed and developing countries, and even of future generations,⁸⁵ it did little in its early years to conceptualize or respond to the correlations between gender, poverty, marginalization, and the environment.⁸⁶ In common with U.S. environmental law, international environmental law largely perpetuates existing paradigms of power, both horizontally across states⁸⁷ and vertically within them.⁸⁸ Yet, below these superstructures of power change is happening, largely driven from the ground up, and often led by historically excluded communities.⁸⁹

84. Over time, the principle of sustainable development became the normative frame embodying this approach. WORLD COMM'N ON ENV'T & DEV., OUR COMMON FUTURE 41 (1987), <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> (defining sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”).

85. See U.N. Conference on the Human Environment, *Stockholm Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1, princ. 1 (June 16, 1972) [hereinafter *The Stockholm Declaration*].

86. *E.g.*, The Stockholm Declaration placed little emphasis on gender, poverty, justice, fairness, or equity. *Id.* By 1992, principles of international environmental law evolved to acknowledge the interests and role of women, Indigenous peoples, and “people under oppression, domination and occupation.” U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), reprinted in [1992] 31 ILM 874. See also INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez & Jona Razzaque eds., 2015) [hereinafter INTERNATIONAL ENVIRONMENTAL LAW] (advocating for environmental justice for developing countries bearing the brunt of pollution).

87. See, e.g., M. Rafiqul Islam, *History of the North-South Divide in International Law: Colonial Discourses, Sovereignty, and Self-Determination*, in INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 86, at 23. See also Usha Natarajan, *Twail and the Environment: The State of Nature, the Nature of the State, and the Arab Spring*, 14 OR. REV. INT'L L. 177, 186 (2012) (“Third World states, peoples, and scholars have long been wary of the international environmental law project, perceiving it as an attempt to ameliorate Western development mistakes at the expense of Third World development.”).

88. See Phillipa Norman, *Surfacing the Silent Others: Women and the Environment*, 19 N.Z. J. ENV'T L. 1 (2015); Gonzalez, *Bridging the North-South Divide*, *supra* note 31; Christopher C. Joyner & George E. Little, *It's Not Nice to Fool Mother Nature! The Mystique of Feminist Approaches to International Environmental Law*, 14 B.U. INT'L L.J. 223 (1996) (discussing the disproportionate effects of environmental degradation on women in developing countries).

89. The TWAIL literature offers important insight into the way that international environmental law centers and perpetuates colonial and postcolonial patterns of management control and offers new “lenses to critique and reform” international environmental law. Alternative critical lenses such as the decolonization/fallism lens emerging from the #FeesMustFall (“#FMF”) Movement in South Africa encompass even

For example, the interweaving of environmental, feminist, and social justice thought that informs the climate justice movement has roots in African feminist-environmental activism that preceded the current crisis and forged a link between social justice and environmental degradation.

Wangari Maathai's work exemplifies the inception and influence of intersectional environmental leadership. In the 1960s, Kenya experienced extensive ecological decline. Environmental degradation was visible throughout the country, with "watersheds drying up, streams disappearing, and the desert expanding south from the Sahara."⁹⁰ Shortly following Kenya's independence from Britain in 1963, Wangari Maathai returned home from studying abroad in the United States and Germany to discover that the lands where she had grown up were barely recognizable. Where vast forests used to be, land had been cleared for "plantations of fast-growing exotic trees that drained the ecosystem of water and degraded the soil."⁹¹ The landscape was changing quickly, reshaping the local communities in visible and invisible ways. As Maathai witnessed these transformations, she observed the connections between the health of the environment and the health and well-being of those who depended on it, particularly women and marginalized communities. She began to see that "the erosion of resources was also the erosion of women's rights; the right to feed their children and gain sufficient wages through farming."⁹² Even as she witnessed the ongoing environmental and social change, Maathai was fighting to have a voice in a still deeply patriarchal society.

By the early 1970s, Maathai had carved out leadership roles for herself in the academic and civic communities.⁹³ As she worked to

broader intersectional critical approaches to international environmental law, advancing discourses of colonialism that "draws upon black consciousness and African nationalism" and also take into account "issues of worker rights, women's rights, and the rights of lesbian, gay, bisexual, transgender, intersex, asexual, and queer ("LGBTIAQ+") individuals." See Humby, *supra* note 9, at 317, 329.

90. Mia MacDonald, *The Green Belt Movement, and the Story of Wangari Maathai*, YES! MAGAZINE (Mar. 26, 2005), <https://www.yesmagazine.org/issue/media/2005/03/26/the-green-belt-movement-the-story-of-wangari-maathai/>.

91. *Id.*

92. Rosie MacLeod, *Fem-Vironmentalism: Wangari Maathai, a Grassroots Feminist*, THE VAGENDA (June 5, 2015), <http://vagendamagazine.com/2015/06/fem-vironmentalism-wangari-maathai-a-grass-roots-feminist/index.htm>.

93. Notably, Maathai was one of the first women in East or Central Africa to earn her Ph.D. See WANGARI MAATHAI, UNBOWED: A MEMOIR 115-17 (2007) [hereinafter MAATHAI, UNBOWED]. See also *Wangari Maathai: Facts*, THE NOBEL PRIZE, <https://www.nobelprize.org/prizes/peace/2004/maathai/facts/> (last visited May 12, 2021).

advance social and economic development in Kenya, she became increasingly convinced that environmental degradation was the root cause of many of the country's most pervasive problems, including gender inequality.⁹⁴ In what would become a turning point both for Maathai's own activism and the global environmental movement, in 1977, Maathai initiated a tree-planting event to celebrate World Environment Day. The simple yet path-breaking goal of the tree planting event, was "to respond to the needs of rural Kenyan women who reported that their streams were drying up, their food supply was less secure, and they had to walk further and further to get firewood for fuel and fencing."⁹⁵ The event marked the inception of the global 'Green Belt Movement,' and the first of Maathai's many initiatives weaving together efforts to advance women's rights, environmental conservation, and economic development.⁹⁶

The effects of Maathai's work rippled outward, leading to the planting of more than 50 million trees worldwide and advancing understanding of the connections between environmental quality and women's rights, as well as the larger relationships between social and economic justice, human rights, and the environment.⁹⁷ By concretely demonstrating the connections between environmentalism, feminism, and social and economic justice Maathai created a roadmap for advancing women's rights, alleviating poverty, and enhancing democracy through local environmentalism. In 2004, in recognition for her "contribution[s] to sustainable development, democracy and peace," Maathai was awarded the Nobel Peace Prize, the first African woman to receive this recognition.⁹⁸

Maathai's work is a very prominent example of integrative environmental activism. But similar efforts to address challenges arising at the intersection of environmental degradation, gender, poverty, and race are taking place worldwide.⁹⁹ These approaches

94. MAATHAI, UNBOWED, *supra* note 93, at 124-25.

95. *Our History*, THE GREEN BELT MOVEMENT, <https://www.greenbeltmovement.org/who-we-are/our-history> (last visited May 17, 2021) [hereinafter *Green Belt Our History*].

96. See generally WANGARI MAATHAI, THE GREEN BELT MOVEMENT: SHARING THE APPROACH AND THE EXPERIENCE (2003).

97. See Matiangai Sirleaf, *Ebola Does Not Fall From the Sky: Structural Violence & International Responsibility*, 51 VAND. J. TRANSNAT'L L. 477, 484 (2018) (describing how the "Greenbelt Movement illustrated the connection between structural violence and environmental concerns").

98. *Wangari Maathai: Facts*, *supra* note 93.

99. Consider, also, the important work that Vandana Shiva has done to advance the

consider gender equality, as well as racial, social, and economic equality, as “catalyst[s] for breaking cycles of poverty and a prerequisite to sustainable development.”¹⁰⁰

Drawing from these lessons, feminist and social-justice oriented perspectives increasingly infuse environmental movements worldwide.¹⁰¹ Now, more than ever, the climate crisis is reviving dialogue at the intersection of feminism, environmentalism, and social justice and creating the space and momentum for intersectional ideas to flourish in conversations around environmental and climate law.¹⁰² Alongside early intersectional international efforts, the U.S. environmental justice movement helped lay the foundation for these burgeoning efforts.

B. *Environmental Justice*

The modern environmental justice (“EJ”) movement began in the 1980s, when over 500 environmental and civil rights activists came together to protest the dumping of more than 6,000 truckloads of PCB-laced soil in a landfill in Acton, North Carolina, a small, predominantly Black community.¹⁰³ Prompted by growing

global environmental justice movement. *See, e.g.,* Vandana Shiva, *Earth Democracy: Sustainability, Justice, and Peace*, 26 *BUFF. ENV'T L.J.* 1, 1 (2019); Vandana Shiva, *Vandana Shiva: Everything I Need to Know I Learned in the Forest*, YES! MAGAZINE (May 3, 2019), <https://www.yesmagazine.org/issue/nature/2019/05/03/vandana-shiva-seed-saving-forest-biodiversity>; VANDANA SHIVA, *EARTH DEMOCRACY: JUSTICE, SUSTAINABILITY, AND PEACE* (2015). Closer to home, for decades, Winona LaDuke, co-founder of Honor the Earth, has been working to highlight issues of environmental justice within Indigenous communities. *See, e.g.,* *About Us*, HONOR THE EARTH, <https://www.honorearth.org/about> (last visited Apr. 16, 2022); Winona LaDuke, *TO BE A WATER PROTECTOR: THE RISE OF THE WIINDIGOO SLAYERS* (2020).

100. Lucy Wanjiru, *Gender, Climate Change and Sustainable Development*, 23 *FORDHAM ENV'T L. REV.* 1, 1 (2012). *See also* David Monsma, *Equal Rights, Governance, and the Environment: Integrating Environmental Justice Principles in Corporate Social Responsibility*, 33 *ECOLOGY L.Q.* 443, 489 (2006).

101. *See, e.g.,* Carmen G. Gonzalez, *Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade*, 32 *DENV. U.L. REV.* 1001, 1014 (2001) [hereinafter Gonzalez, *Beyond Eco-Imperialism*] (“Environmental injustice cannot be separated from economic inequality, race and gender subordination, and the colonial and post-colonial domination of the global South.”).

102. *See, e.g.,* PANAFRICAN JUST. ALL., <https://www.pacja.org> (last visited June 29, 2021); INDIGENOUS ENV'T NETWORK, <https://www.ienearth.org/about/> (last visited June 29, 2021).

103. The early roots of the U.S. environmental justice movement date back to the 1960s, to events such as the Memphis Sanitation Strike in 1968. *See Environmental Justice History*, ENERGY.GOV, <https://www.energy.gov/lm/services/environmental-justice/environmental-justice-history> (last visited Apr. 10, 2022). *See also* Purdy, *Environmental Justice*, *supra* note 10, at 835-45.

awareness of “the interplay of race, poverty, and environmental risk” and spurred by “findings that poor and of-color communities suffer from pollution more frequently and severely than their white counterparts,”¹⁰⁴ the EJ movement advances social and racial justice and pushes back against environment-based inequities.¹⁰⁵

In response to concerns about disparate levels of exposure to environmental risk, in 1994, President Bill Clinton issued Executive Order (12898): *Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Population*.¹⁰⁶ The Order mandated that every federal agency “shall make achieving environmental justice part of its mission.”¹⁰⁷ The Order neither defined environmental justice nor created a private right of action related to environmental justice.¹⁰⁸ However, it helped legitimize and

104. Maxine Burkett, *Just Solutions to Climate Change: A Climate Justice Proposal for a Domestic Clean Development Mechanism*, 56 BUFF. L. REV. 169, 188 (2008) [hereinafter Burkett, *Just Solutions*]. See also Tsosie, *supra* note 5, at 1629; Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENV'T L. REP. 10681, 10688, 10693-94 (2000); ROBERT D. BULLARD, DUMPING IN DIXIE 116 (2d ed. 1994).

105. See Robert Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, in CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS (Robert D. Bullard ed., 1993) [hereinafter Bullard, *Anatomy*]; *Toxic Waste and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities With Hazardous Waste Sites*, COMMISSION FOR RACIAL JUSTICE (1987), http://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy_url/13567/toxwrace87.pdf?1418439935. For an overview of the environmental justice movement in the Global South, see Usha Natarajan, *Environmental Justice in the Global South*, in THE CAMBRIDGE HANDBOOK OF ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT 39 (2021).

106. *E.g.*, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629, Exec. Order No. 12898, 3 C.F.R. § 389 (1994), reprinted in 42 U.S.C. § 4321 (1994), Admin. Mat. 45075 [hereinafter Order No. 12898].

107. *Id.*

108. The EPA defines environmental justice as:

[T]he fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. EPA has this goal for all communities and persons across this Nation. It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.

Environmental Justice, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/environmentaljustice> (last visited May 17, 2021). See also Helen H. Kang, *Pursuing Environmental Justice: Obstacles and Opportunities - Lessons From the Field*, 31 WASH. U. J.L. & POL'Y 121, 123-24 (2009) (“At the [Environmental Law and Justice] clinic we define environmental justice (“EJ”) communities as low-income communities and communities with a majority population who

institutionalize the EJ movement, and it created a process for identifying ways in which environmental efforts fail to protect particular communities.

President Clinton's Executive Order prompted federal agencies to develop environmental justice policies,¹⁰⁹ provide "funding opportunities for grassroots groups that work on environmental issues," and "sponso[r] seminal studies of pollution hot spots as a result of consistent and organized demands from communities and growing health research on disproportionate exposure to pollution and cumulative risk."¹¹⁰ Together with community organizing, increasing litigation efforts, and mounting evidence of persistent environmental injustices, the EJ movement grew and evolved.¹¹¹ But it has largely done so at the periphery of mainstream environmentalism and environmental law. Forty years after the Acton protests, environmental justice considerations have "failed to affect environmental decision making" or "change[] the behavior of polluters in any significant way."¹¹² Environmental law remains largely detached and non-responsive to the disproportionate environmental burdens that communities of color and low-income communities continue to shoulder.¹¹³ The impacts of this detachment become even more acute when you consider the discriminatory tendencies of environmental law itself.¹¹⁴ Persistent patterns of

are people of color. While we couple this demographic description with another modifier that is typically used to describe EJ communities—populations that bear disproportionate pollution burdens and enjoy fewer environmental amenities—this second modifier tends to be redundant. When cases come to us from low-income or people-of-color communities, disproportionate environmental benefits and burdens are always present. Pollution mapping and academic studies suggest that our experience is not unique.”).

109. The Order requires each federal agency to “develop an agency-wide environmental justice strategy . . . that identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.” Order No. 12898, *supra* note 106, at 1-103.

110. Kang, *supra* note 108, at 126.

111. *See id.* at 129-37. *See also* Bullard, *Anatomy*, *supra* note 105; Burkett, *Just Solutions*, *supra* note 104.

112. Kang, *supra* note 108, at 126.

113. Christopher W. Tessum et al., *PM_{2.5} Polluters Disproportionately and Systemically Affect People of Color in the United States*, 18 *SCIENCE ADVANCES* 1, 1 (2021) (“Racial-ethnic minorities in the United States are exposed to disproportionately high levels of ambient fine particulate air pollution (PM), the largest environmental cause of human mortality.”).

114. *See* Wyatt G. Sassman, *Critical Questions in Environmental Law*, 97 *U. DET. MERCY L. REV.* 487, 491 (2020) (“revealing the limits of environmental law and its role in perpetuating structural inequality, as well as obliterating boundaries within environmental

inequitable enforcement have revealed the capacity of environmental law to perpetuate racism and other forms of discrimination.¹¹⁵ As Gerald Torres describes:

[E]nvironmental regulations, like all other actions of the regulatory state, have a potential racial impact and the willful ignorance of that impact may itself be racist *even if* the intention behind the rule had no racial animus at all. Environmental regulations, like other regulations, gain no immunity by claiming color-blindness where a demonstrable impact on subordinated racial groups exists.¹¹⁶

Such racially imbalanced implementation and enforcement of environmental law leaves minority communities to “feel they are victims three times over – first by polluters, then the government, and finally the legal system.”¹¹⁷

The 2014-2015 Flint, Michigan Water Crisis demonstrates the persistence of these patterns. In one of the worst domestic environmental crises of modern times, a series of governmental failures, including the failure to enforce the Safe Drinking Water Act for months after being made aware of violations, led to Flint’s drinking water supply being contaminated with lead and bacteria.¹¹⁸ Flint is a community where 50% of the population is Black and more than 40% of the residents live below the poverty line.¹¹⁹ The long-

law and between environmental law and other fields”).

115. See Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839, 840 (1992); Keith Hirokawa, *Some Pragmatic Observations About Radical Critique in Environmental Law*, 21 STAN. ENV’T L.J. 225, 237–38 (2002). See also Angela P. Harris, *Criminal Justice as Environmental Justice*, 1 J. GENDER RACE & JUST. 1, 23 (1997) (describing environmental justice analysis as seeking “to make visible the connections between local social ills such as pollution, ill health, and crime and larger patterns of economic and social injustice”).

116. Torres, *supra* note 115, at 840.

117. Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, 15 NAT’L L.J. (Sept. 21, 1992), at S1-S12, <https://www.ejnet.org/ej/nlj.pdf>. For a recent illustration of this problem, see Jean Chemnick, *Soot Rule Thrusts EPA into the Spotlight on Race*, CLIMATE WIRE (June 12, 2020), <https://www.scientificamerican.com/article/soot-rule-thrusts-epa-into-spotlight-on-race/>.

118. See *The Safe Drinking Water Act and Flint, Michigan: How We Can Update Our Standards for Safe Drinking Water*, CORNELL POL’Y REV. (Lillian Gabreski ed., May 31, 2018), <http://www.cornellpolicyreview.com/sdwa-flint-michigan/>; Lindsey J. Butler, Madeleine K. Scammell & Eugene B. Benson, *The Flint, Michigan Water Crisis: A Case Study in Regulatory Failure and Environmental Injustice*, 9 ENV’T JUST. 93 (2016).

119. Michael Martinez, *Flint, Michigan: Did Race and Poverty Factor into Water Crisis?*, CNN NEWS (Jan. 28, 2016, 11:16 AM), <https://www.cnn.com/2016/01/26/us/flint-michigan-water-crisis-race-poverty>.

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term health impacts from the contaminated water are not yet known, but it is clear that they are extensive and disproportionately borne by already vulnerable and historically excluded populations.¹²⁰

In line with trends in both the international environmental and EJ movements, women leaders played pivotal roles in exposing and responding to the Flint Water Crisis.¹²¹ Over time, women have taken on increasingly important leadership roles in the EJ movement. As Robert Verchick suggests, by the mid-90s the EJ movement had become a deeply intersectional movement:

[M]any of the most visible and effective environmental justice organizations in the country are led by and consist mainly of women. As a result, while the environmental justice movement is certainly an environmental movement, a civil rights movement, and a public health movement, it is also, quite literally, a women's movement, and, I suggest, a feminist movement as well.¹²²

The maturing EJ movement identifies and responds to critical issues at the intersection of the environmental, civil rights, poverty, and women's rights movements. It has generated a vocabulary and a dialogue amongst lawmakers and activists working across these issue areas.

However, despite meaningful progress and maturation since the 1980s, the EJ movement struggles to effect widespread legal change or alleviate persistent patterns of environmental injustice.¹²³ More is needed. The climate justice movement builds on the foundation of the EJ movement and its efforts to expand environmental law.

120. See Laura Pulido, *Flint, Environmental Racism, and Racial Capitalism*, 27 CAPITALISM NATURE SOCIALISM 1 (2016) (“[T]he people of Flint are so devalued that their lives are subordinated to the goals of municipal fiscal solvency. This constitutes racial capitalism because this devaluation is based on both their blackness and their surplus status, with the two being mutually constituted.”).

121. See, e.g., Jennifer Hammonds, *Clean Water Champions: The Women of the Flint Water Crisis*, NATIONAL WILDLIFE FEDERATION BLOG (Mar. 20, 2019), <https://blog.nwf.org/2019/03/clean-water-champions-the-women-of-the-flint-water-crisis/>.

122. Robert R.M. Verchick, *In a Greener Voice: Feminist Theory and Environmental Justice*, 19 HARV. WOMEN'S L.J. 23, 24-25 (2006).

123. See, e.g., ROBERT D. BULLARD & BEVERLY WRIGHT, *THE WRONG COMPLEXION FOR PROTECTION: HOW THE GOVERNMENT RESPONSE TO DISASTER ENDANGERS AFRICAN AMERICAN COMMUNITIES* (2012); *POWER, JUSTICE, AND THE ENVIRONMENTAL MOVEMENT* (David N. Pellow & Robert J. Brulle eds., 2005).

C. Climate Justice

Climate justice emerges at the intersection of the movements for environmental, social, racial, economic, and gender equality.¹²⁴ Drawing from the EJ movement and from the work of global leaders such as Maathai, the climate justice movement spotlights not only how social and economic inequality perpetuates patterns of climate change, but also how climate change deepens inequality by disproportionately affecting members of society who already face higher levels of vulnerability.¹²⁵

As Maxine Burkett notes, the field of climate justice:

takes, as a basic premise, that the disadvantaged in the United States stand to suffer the risks of warming more severely than others, as do their counterparts in the global South. Climate justice also recognizes the direct kinship between social inequality and environmental degradation, which is not isolated to the global south.¹²⁶

The climate justice movement resituates the conversation around climate change. It strips away the framing of climate change as a challenge that can be dealt with using traditional tools of environmental law.¹²⁷ Instead, it approaches climate change as a sweeping socioeconomic challenge. Climate justice approaches focus on the inequitable patterns of development that give rise to the current crisis, the distributive effects of climate change, and the opportunities the crisis presents to lay bare and respond to the structures that enable and perpetuate these patterns.¹²⁸ Climate

124. Principles of gender equality and climate justice were not integrated into the fold of international law until the 2015 Paris Agreement. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, at pmb1. See also Cinnamon P. Carlarne & JD Colavecchio, *Balancing Equity and Effectiveness: The Paris Agreement and the Future of International Climate Change Law*, 27 N.Y.U. ENV'T L.J. 107, 121-24 (2019).

125. See generally Alice Kaswan, *Climate Adaptation and Theories of Justice*, in PHILOSOPHY, LAW AND ENVIRONMENTAL CRISIS 97 (Alain Papaux & Simone Zurbuchen eds., 2016).

126. Burkett, *Just Solutions*, supra note 104, at 192-93.

127. See, e.g., Cinnamon Carlarne, *Delinking International Environmental Law & Climate Change*, 4 MICH. J. ENV'T & ADMIN. L. 1, 6 (2014) [hereinafter Carlarne, *Delinking*].

128. See, e.g., Anna Kaijser & Annica Kronsell, *Climate Change Through the Lens of Intersectionality*, 23 ENV'T POL. 417, 417 (2014) (noting how an intersectional approach to climate change helps “illuminat[e] how different individuals and groups relate differently to climate change, due to their situatedness in power structures based on context-specific and dynamic social categorisations.”); Andrea Thompson, *Here’s How Scientists Want Biden to Take on Climate Change*, SCIENTIFIC AMERICAN (Nov. 12, 2020),

justice advocates highlight the intersections that so much of environmental law and mainstream environmentalism has missed. At the same time, they call for complementary social and law reform movements to do the same. In this way, the climate justice movement shakes the foundations of environmentalism, forcing it to see its own limitations even as it invites others to work cooperatively.

As it pushes against issue boundaries, the climate justice movement also challenges existing structures of power and modes of decision-making. Climate justice activists call for all members of society to have meaningful modes of participation in decision-making processes, particularly those peoples most affected by climate change. This includes women and girls, who “are and have always been at the forefront of the climate justice movement.”¹²⁹ Across generations and across the globe, female leaders are springing up, many of whom are youth, women of color, Indigenous peoples, or otherwise historically excluded groups.¹³⁰ In addition to high profile leaders such as Mary Robinson,¹³¹ Christiana Figueres,¹³² and Patricia Espinosa,¹³³ young leaders are stepping up, including Greta

<https://www.scientificamerican.com/article/heres-how-scientists-want-biden-to-take-on-climate-change/> (quoting Farhana Sultana: “Climate breakdown is a matter of survival of peoples and the planet. It is an intersectoral, international and intersectional issue, thus necessitating actions that are comprehensive. To do this meaningfully, I think the most important action the Biden administration can do is to undertake all its policies and actions through a *climate justice lens*—which would enable seeing the interconnections across sectors and policies—and approach action with equity, accountability and justice in mind.”).

129. Lucina Di-Meco, *Why Female Leadership is What the Climate Justice Movement Needs*, MS. MAGAZINE (July 19, 2019), <https://msmagazine.com/2019/07/19/why-female-leadership-is-what-the-climate-justice-movement-needs/>.

130. See, e.g., Stephen Rodrick, *How One Swedish Teenager Armed With a Homemade Sign Ignited a Crusade and Became the Leader of a Movement*, ROLLINGSTONE (Mar. 26, 2020), <https://www.rollingstone.com/politics/politics-features/greta-thunberg-climate-crisis-cover-965949/>; Arthur Wyns, *25 Female Climate Leaders Shaping 2019*, ECOLOGIST (Mar. 8, 2019), <https://theecologist.org/2019/mar/08/25-female-climate-leaders-shaping-2019>; CNN Staff, *Christiana Figueres on Why Women Are Vital to the Climate Fight*, CNN NEWS (Mar. 8, 2020, 4:10 AM), <https://www.cnn.com/2020/03/08/world/christiana-figueres-interview-c2e/index.html>.

131. See JP O’Malley, *Climate Justice by Mary Robinson Review – Power to the People*, THE GUARDIAN (Oct. 14, 2018, 4:00 AM), <https://www.theguardian.com/books/2018/oct/14/climate-change-hope-resilience-fight-for-sustainable-future-mary-robinson-review>.

132. See Wyns, *supra* note 130; *Christiana Figueres*, UNITED NATIONS CLIMATE CHANGE, <https://unfccc.int/about-us/the-executive-secretary/former-executive-secretary-ms-christiana-figueres> (last visited June 23, 2020).

133. See *Patricia Espinosa*, UNITED NATIONS SECRETARY-GENERAL, <https://www.un.org/sg/en/content/profiles/patricia-espinosa> (last visited June 23, 2020); Ed King, *Patricia Espinosa: Who is the UN’s Incoming Climate Change Chief?*, CLIMATE HOME NEWS (May 5, 2016, 3:52 PM), <https://www.climatechangenews.com/2016/05/05/patricia-espinosa-who-is-the-uns-incoming-climate-change-chief/>.

Thunberg, the teenage founder of the Fridays for Future movement;¹³⁴ India Logan-Riley, a young Maori activist doing climate justice work with the International Indigenous Peoples Forum;¹³⁵ Isra Hirsi, the teenage co-founder of youth climate strike in the United States;¹³⁶ and Oladosu Adenike, the Nigerian ecofeminist activist fighting for an intersectional approach to climate change.¹³⁷ The climate justice movement they represent envisions—and fights for—a world where the focus is on simultaneously limiting the negative effects of climate change and reshaping existing social, political, and economic relationships along the way. It is a way of thinking and being that builds on the work of early intersectional environmental leaders such as Wangari Maathai.

Bringing a multivocal, justice-oriented approach to climate change draws upon long-standing ideas in feminist legal theory and critical race theory that seek to situate gender and race within multiple overlapping structures of power, authority, and inequality to better understand and respond to the causes and consequences of systemic inequities.¹³⁸ Moreover, the climate justice movement mirrors a converging turn in feminism towards a model of social justice feminism that draws upon lessons from intersectional and critical race feminism to recognize and respond to the intersections among gender, “race, class, sexual orientation, and other realities of experience.”¹³⁹ As Kristin Kalsem and Verna L. Williams describe in their 2010 article, *Social Justice Feminism*, “[a]ctivists concerned about what women in the twenty-first century want to do social justice feminism.”¹⁴⁰ Equally, climate activists concerned about the environment-equity interface want to do climate justice. At the

134. *Who We Are*, FRIDAYS FOR FUTURE, <https://fridaysforfuture.org/what-we-do/who-we-are/> (last visited May 17, 2021).

135. *India Logan-Riley*, THE ARA WHATU, <https://tearawhatu.org/india> (last visited May 17, 2021).

136. Leila Ettachfani, *Isra Hirsi is 16, Unbothered, and Saving the Planet*, VICE (Sept. 18, 2019, 11:38 AM), https://www.vice.com/en_us/article/a357wp/isra-hirsi-ilhan-omar-daughter-climate-strike-profile.

137. Abdullahi Tsanni, *My Climate Action Campaign Has Just Begun – Adenike Oladosu*, AFRICAN NEWSPAGE (June 11, 2019), <https://www.africannewspage.net/2019/06/11/interview-my-fight-for-climate-action-has-just-begun-adenike-oladosu/>.

138. See Kalsem & Williams, *supra* note 33, at 146-47, 159-60; see also Darling, *supra* note 77, at 379-80; Heather McLeod-Kilmurray, *An Ecofeminist Legal Critique of Canadian Environmental Law: The Case Study of Genetically Modified Foods*, 26 WINDSOR REV. LEGAL & SOC. ISSUES 129, 136 (2009).

139. Harris, *Race and Essentialism*, *supra* note 31, at 585.

140. Kalsem & Williams, *supra* note 33, at 192.

intersection of the climate justice movement and social justice feminism is a shared concern that, whether the focus is on limiting environmental degradation or advancing women's rights, these efforts must be situated as part of a much wider movement to construct "a framework for transforming society and how its institutions allocate resources, rights, and the capacity to exercise rights."¹⁴¹

In the climate context, this encourages policies that contemplate minimizing the disparate harms of climate change while maximizing the social and economic opportunities associated with transitioning justly to a low-carbon economy.¹⁴² The movement for climate justice pushes environmental law back to its roots and to the lessons of ecology. It pushes law, more broadly, to recognize how it often operates in ways that silence entire communities, overlook historically excluded interests, and cut across issues in ways that deepen divides and miss opportunities for synergistic progress.¹⁴³

The climate justice movement is deepening and expanding worldwide.¹⁴⁴ Yet it continues to exist at the periphery of mainstream environmental and climate law, including legal scholarship. With some notable exceptions,¹⁴⁵ when legal scholarship has focused on questions of fairness and equity, it has tended to focus on distributive issues, such as those embodied by the principles of equity and common but differentiated responsibilities and respective capacities (CBDRRC).¹⁴⁶ This literature focuses primarily on north-south (or,

141. *Id.* at 150–51.

142. See Nathalie J. Chalifour, *A Feminist Perspective on Carbon Taxes*, 21 CANADIAN J. OF WOMEN & THE LAW 169, 171–72 (2010); Cinnamon Carlame, *Environmental Law & Feminism*, in THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES (Deborah L. Brake, Martha Chamallas & Verna L. Williams eds., forthcoming); Sara L. Seck, *Revisiting Transnational Corporations and Extractive Industries: Climate Justice, Feminism, and State Sovereignty*, 26 TRANSNAT'L L. & CONTEMP. PROBS. 383, 410 (2017).

143. See Norman, *supra* note 88; Harris, *Race and Essentialism*, *supra* note 31; Chemnick, *supra* note 117; Taylor, *Race, Class, Gender*, *supra* note 68; Cole, *supra* note 66, at 620–21.

144. See MARY ROBINSON, CLIMATE JUSTICE: HOPE, RESILIENCE, AND THE FIGHT FOR A SUSTAINABLE FUTURE (2018); *Climate Justice*, U.N.: SUSTAINABLE DEVELOPMENT GOALS (May 31, 2019), <https://www.un.org/sustainabledevelopment/blog/2019/05/climate-justice/>.

145. See, e.g., Gonzalez, *Climate Justice*, *supra* note 31; Gonzalez, *Bridging the North-South Divide*, *supra* note 31; Gonzalez, *Beyond Eco-Imperialism*, *supra* note 101; Burkett, *Litigating*, *supra* note 77; Burkett, *Just Solutions*, *supra* note 104; Kang, *supra* note 108; Seck, *supra* note 142; Lovvorn, *Climate Change*, *supra* note 31; Kalsem & Williams, *supra* note 33; Benjamin Brown & Samuel J. Spiegel, *Coal, Climate Justice, and the Cultural Politics of Energy Transition*, 19 GLOBAL ENV'T POL. 149 (2019); Gibbons, *supra* note 80; Kaijser & Kronsell, *supra* note 128.

146. See Christopher Stone, *Common but Differentiated Responsibilities in*

developed-developing country) roles and relationships, and neglects other principles at the heart of the climate and environmental justice movements, such as gender.¹⁴⁷ Questions of corrective, procedural, and social justice, including questions of gender and racial equality, have received relatively short shrift.¹⁴⁸ The climate justice movement seeks to expand the conversation.

D. *Environmental Rights*

Environmental degradation undermines fundamental rights, including the rights to life, health, culture, and property, among others.¹⁴⁹ As the climate justice movement swells worldwide, so too does the environmental rights revolution.¹⁵⁰ In common with the environmental and climate justice movements, the environmental rights movement seeks to situate questions of environmental protection and human-environment relationships within a thicker social and legal context. The rights revolution harkens back to Commoner's early admonition that the roots of the environmental crisis are as entangled with how humans treat one another as with how humans treat the environment.¹⁵¹

As early as the 1972 Stockholm Declaration, international environmental law recognized the relationship between human rights and environmental quality.¹⁵² However, just as little was done

International Law, 98 AM. J. INT'L L. 276, 278 (2004).

147. See, e.g., Fatma Denton, *Gender and Climate Change: Giving the "Latecomer" a Head Start*, 35 IDS BULLETIN 42 (2004).

148. See Alice Kaswan, *Environmental Justice and Domestic Climate Change Policy*, 38 ELR 10287, 10289 (2008).

149. See, e.g., Sheila Watt-Coutler, *Petition to the Inter American Commission on Human Rights Seeking Relief From Violations Resulting From Global Warming Caused by Acts and Omissions of the United States*, (Dec. 7, 2005), https://earthjustice.org/sites/default/files/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf [hereinafter *Inuit Petition*]; Chiara Sacchi et al., *Communication to the Committee on the Rights of the Child*, (Sept. 23, 2019), <https://childrensvclimatecrisis.org/wp-content/uploads/2019/09/2019.09.23-CRC-communication-Sacchi-et-al-v.-Argentina-et-al-Redacted.pdf> [<https://perma.cc/3ELM-RWLY>].

150. See, e.g., LYNDA COLLINS, *THE ECOLOGICAL CONSTITUTION: REFRAMING ENVIRONMENTAL LAW* (2021); HUMAN RIGHTS AND THE ENVIRONMENT: LEGALITY, INDIVISIBILITY, DIGNITY AND GEOGRAPHY (James R. May & Erin Daly eds., 2019); THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT (John H. Knox & Ramin Pejan eds., 2018); BRIDGET LEWIS, *ENVIRONMENTAL HUMAN RIGHTS & CLIMATE CHANGE: CURRENT STATUS & FUTURE PROSPECTS* (2018); DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* (2012).

151. See Commoner, Lecture, *supra* note 52.

152. *The Stockholm Declaration*, *supra* note 85, at 4 ("[M]an has the fundamental

during the first two decades to respond to linkages between environmental degradation and disparate human impacts at the domestic level,¹⁵³ so too little was done at the international level to respond to the relationship between human rights and the environment.¹⁵⁴ As with domestic environmental law, international environmental law emerged and evolved largely separate from, and, at times, in tension with human rights law.¹⁵⁵ As patterns of global environmental degradation and climate disruption deepen, however, recognition of the links between human rights and the environment is increasing. As then U.N. Special Rapporteur on human rights and the environment, John H. Knox, declared in 2018, “[t]here can no longer be any doubt that human rights and the environment are interdependent. . . . A healthy environment is necessary for the full enjoyment of many human rights, including the rights to life, health, food, water and development.”¹⁵⁶

As testament to the growth of this movement, more than 100 nations now recognize the right to a healthy environment.¹⁵⁷ Moreover, the right to a healthy environment has been incorporated into numerous regional human rights agreements and environmental treaties.¹⁵⁸ As Knox reported to the U.N. General Assembly, “no other ‘new’ human right has gained such widespread constitutional recognition so rapidly.”¹⁵⁹

right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.”).

153. See discussion *supra* Part III(A).

154. See Alan Boyle, *The Role of International Human Rights Law in the Protection of the Environment*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 44, 49, 63 (Alan E. Boyle & Michael R. Anderson eds., 1998) [hereinafter Boyle, *The Role*].

155. See, e.g., Alan Boyle, *Human Rights or Environmental Rights - A Reassessment*, 18 FORDHAM ENV'T L. REV. 471 (2007); Cinnamon Carlarne, *Climate Change, Human Rights, & The Rule of Law*, 25 UCLA J. INT'L L. & FOREIGN AFFS. 11 (2020); Jona Razzaque, *Human Rights and the Environment*, 32 ENV'T POL'Y & L. 99 (2002). See also Jedediah Purdy, *Our Place in the World: A New Relationship for Environmental Ethics and Law*, 62 DUKE L.J. 857 (2013).

156. *UN Expert Calls for Global Recognition of the Right to a Safe and Healthy Environment*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (Mar. 5, 2018), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22755&LangID=E>.

157. John H. Knox, *Framework Principles on Human Rights and the Environment*, U.N. HUM. RTS. SPECIAL PROCS. 6 n.1 (2018), <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf> [https://perma.cc/3GAF-DYE3].

158. *Id.*

159. U.N. General Assembly, *Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc. A/73/188 (2018), <http://srenvironment.org/sites/default/files/Reports/2018/Boyd%20Knox%20UNGA%20>

Climate change amplifies the interdependencies between human rights and the environment and threatens the realization of numerous human rights, including the rights to life, adequate food, health, housing, self-determination, safe drinking water and sanitation, among others.¹⁶⁰ These threats are particularly acute for vulnerable populations. As stated by the U.N. Human Rights Council, the effects of climate change will be “felt most acutely by those segments of the population who are already in vulnerable situations owing to factors such as geography, poverty, gender, age, Indigenous or minority status and disability.”¹⁶¹

As the impacts of climate change intensify, so too do efforts to draw upon rights based claims to limit climate change.¹⁶² Many of these efforts focus on the courts, where litigants worldwide are drawing upon constitutional and human rights law to assert that the state has a fundamental legal obligation to address climate change.¹⁶³ Many of these litigants are youth, people of color, and Indigenous peoples seeking to secure their rights and their future, and to do so in a way that responds to the intersections between social inequality, fundamental rights, and environmental degradation.¹⁶⁴ The

report%202018.pdf. A separate movement seeks to recognize the rights of nature; see, e.g., Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

160. UNHRC res. 10/4 (2009) on Human Rights and Climate Change, https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf. See also MARGARETHA WEWERINKE-SINGH, STATE RESPONSIBILITY, CLIMATE CHANGE AND HUMAN RIGHTS UNDER INTERNATIONAL LAW (2019); JACQUELINE PEEL & HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION (2015) [hereinafter PEEL & OSOFSKY, CLIMATE CHANGE]; HUMAN RIGHTS AND CLIMATE CHANGE, (Stephen Humphreys ed., 2010); John H. Knox, *Climate Change and Human Rights Law*, 50 VA. J. INT'L L. 163, 165 (2009).

161. UNHRC res. 10/4 (2009) on Human Rights and Climate Change, *supra* note 160.

162. E.g., Sacchi et al., *supra* note 149.

163. See, e.g., PEEL & OSOFSKY, CLIMATE CHANGE, *supra* note 160; Joana Setzer & Rebecca Byrnes, GLOBAL TRENDS in CLIMATE CHANGE LITIGATION: 2019 SNAPSHOT 8 (2019), http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf [<https://perma.cc/W9BU-7CVG>].

164. See, e.g., Juliana Amended Complaint, *supra* note 6; *Environment and the European Convention on Human Rights*, EUROPEAN COURT OF HUMAN RIGHTS (Apr. 2021), https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf; Juliane Kippenberg, *European Climate Change Lawsuit Spotlights Child Rights*, HUMAN RIGHTS WATCH (Mar. 4, 2021, 5:30 AM), <https://www.hrw.org/news/2021/03/04/european-climate-change-lawsuit-spotlights-child-rights#>; Ivana Kottasová, *Kids Are Taking Governments to Court Over Climate. And They Are Starting to Win*, CNN NEWS (May 9, 2021, 12:47 PM), <https://www.cnn.com/2021/05/09/europe/climate-lawsuits-governments-intl-cmd/index.html>; Karen Savage, *Newest Climate Liability Suits: Climate Justice is Racial Justice*, THE CLIMATE DOCKET (June 30, 2020),

complaints argue that governments worldwide are “creating and supporting a massive threat to our very survival.”¹⁶⁵

As international environmental law evolves, activists worldwide—particularly women, Indigenous people, and other members of historically excluded groups—underscore the necessity of responding to environmental degradation and gender, social, and economic inequality together. Similarly, the EJ movement calls attention to the intersections between race, poverty, and environmental pollution.¹⁶⁶ It spotlights how far and how fast environmental law has strayed from its ecological roots and how completely it failed to ever gain sight of the intimate relationships among social, political, economic, and ecological systems. The climate justice and environmental rights movements build on this work and seek to harness new energy, insight, and power.

These movements are growing in numbers and influence. The urgency of the climate crisis is bringing together youth, women, Indigenous people, people of color, the poor, people with disabilities, the LGBTQIA+ community, and many other historically excluded voices.¹⁶⁷ The message they are projecting is that climate justice is racial justice, is intergenerational justice, is gender justice, is economic justice, is social justice. Or, at least, that it can be if it is done right. Doing it right means hearing and including these voices in every aspect of the lawmaking process. There is still a yawning gap between the message of interconnectivity these movements advance and the

liability-lawsuits-racial-justice/.

165. Douglas A. Kysar, *The Closing Argument*, LA REV. BOOKS BLOG (Jan. 16, 2019), <https://blog.lareviewofbooks.org/provocations/closing-argument>. See generally Cinnamon P. Carlarne, *The Essential Role of Climate Litigation and the Courts in Averting Climate Crisis*, in DEBATING CLIMATE LAW (Benoit Mayer & Alexander Zahar eds., 2021).

166. See Elizabeth Ann Kronk Warner, *Environmental Justice: A Necessary Lens to Effectively View Environmental Threats to Indigenous Survival*, 26 TRANSNAT'L L. & CONTEMP. PROBS. 343, 344 (2017) (“Environmental justice is deeply rooted in several social justice movements within the United States, such as the Civil Rights Movement, Indigenous struggles, and the traditional environmental movement.”).

167. See, e.g., Ilana Cohen, *Across America, Activists Work at the Confluence of LGBTQ Rights and Climate Justice*, INSIDE CLIMATE NEWS (July 2, 2020), <https://insideclimatenews.org/news/02072020/across-america-activists-work-confluence-lgbtq-rights-and-climate-justice/>; Madison Humphrey, *Climate Change is an LGBTQ Issue*, NORTHERN MICHIGAN UNIVERSITY (Nov. 2020), <https://nmu.edu/gender/sites/gender/files/2021-01/Humphrey-GC.GN495-Zine.pdf>; Justine Calma, *Yes, Trans Rights Are an Environmental Issue, Too*, GRIST (Oct. 29, 2018), <https://grist.org/article/transgender-rights-climate-intersectionality/>; Noah Goodwin, *There is No Planet B: Why Climate Change is an LGBTQ Issue*, GLAAD (Apr. 23, 2019), <https://www.glaad.org/amp/no-planet-b-why-climate-change-is-an-lgbtq-issue>.

ways in which environmental law and law, generally, operates.¹⁶⁸ The climate crisis is the distress call pushing the rule of law—and those who shape it—closer to closing the gap.

IV. THE CLIMATE CATALYST: RE-ENVISIONING ENVIRONMENTAL LAW

Escalating intersectional interventions have come at a critical moment in the history of human-Earth interactions. The climate crisis challenges us to confront the limitations of our existing legal systems and “to take seriously the need to overcome barriers, and to evolve to provide meaningful recourse to climate justice.”¹⁶⁹

A starting point for this work is looking to the protagonists of change.¹⁷⁰ In the United States, movements for social change and environmental equity are diverse and growing. There exists, for some, a common intersection at the understanding that “[i]nequality and climate change are the twin challenges of our time.”¹⁷¹ The movements offer varied visions of what a more equitable and sustainable democracy looks like, and what role the rule of law should play in advancing those visions.

This part engages some of these voices and visions. The goal here is not to map out the full ecosystem of activists and movements, but rather to help center these “swells of power” within ongoing efforts to reform environmental and climate law.¹⁷²

A. *Democracy Re-Envisioned: The Voices of the Future*

The youth climate movement has swept across the globe disrupting politics as usual and fueling a new generation of intersectional environmental leaders.¹⁷³ Encapsulated by the raw,

168. See, e.g., Meinhard Doelle & Sara L. Seck, *Pathways and Prospects for Loss and Damage and Climate Justice*, in RESEARCH HANDBOOK ON CLIMATE CHANGE LAW AND LOSS & DAMAGE 493 (Meinhard Doelle & Sara L. Seck eds., 2021).

169. *Id.* at 493.

170. Jennifer Gordon, Concluding Essay, *The Lawyer is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CAL. L. REV. 2133, 2133–36, 2140 (2007).

171. HEATHER MCGHEE, ALL WE CAN SAVE: TRUTH, COURAGE, AND SOLUTIONS FOR THE CLIMATE CRISIS 91 (Ayana Elizabeth Johnson & Katherine K. Wilkinson eds., 2020) [hereinafter ALL WE CAN SAVE].

172. Akbar, Ashar & Simonson, *supra* note 29, at 884.

173. A member of the youth climate movement, Leah Thomas helped coin the term intersectional environmentalism, explaining that it is:

[A] term largely inspired by Professor Kimberlé Crenshaw and her work with critical race theory, [it] is an inclusive form of environmentalism that advocates for

powerful messages of global leaders such as Greta Thunberg, Fatou Lamin Jeng,¹⁷⁴ and Kathy Jetñil-Kijiner,¹⁷⁵ and domestic leaders such as Varshini Prakash, Xiye Bastida, Isra Hirsi, Alexandria Villaseñor, Jerome Foster III, and the plaintiffs in the *Juliana* litigation, youth activism has disrupted and invigorated the climate movement.¹⁷⁶ The voices of the youth movement are many and varied but the common core of their message is straightforward: climate change is an intersectional and immediate crisis, our present and our future are at stake, and inaction is intolerable.¹⁷⁷

Existing largely outside the tangled realm of state politics, the youth movement has become a powerful vehicle for diffusing the message of the urgency of the climate crisis to a wider audience and for finding new inroads into political conversations.¹⁷⁸ The youth movement rejects incrementalism and the idea that climate change is a problem for future generations. For the youth movement, climate change is an urgent and existential manifestation of a much bigger systemic problem. Climate change is a critical symptom of a broken system – a system “that produce[s] other forms of violence, injustice

the protection of all people + the planet. It identifies the ways in which injustices affecting marginalized communities + Mother Earth are interconnected. Intersectional Environmentalism not only acknowledges these links, but brings them to the forefront of environmental activism without minimizing or silencing overt + discreet forms of oppression.

What is Intersectional Environmentalism?, INTERSECTIONAL ENVIRONMENTALIST, <https://www.intersectionalenvironmentalist.com> (last visited July 2, 2021). See also Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1450 (2012); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity, Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

174. Mekdela Maskal, *Young Climate Leaders to Know*, COVERING CLIMATE NOW (Oct. 7, 2020), <https://coveringclimatenow.org/climate-beat-story/youngleaderslist/>.

175. *Save the Islands to Save the World*, UNITED NATIONS CLIMATE CHANGE (July 28, 2017), <https://unfccc.int/news/save-the-islands-to-save-the-world>.

176. Leslie Hook et al., *Greta Thunberg's Influence Grows as Young Activist Heads For US*, FIN. TIMES (Aug. 13, 2019), <https://www.ft.com/content/c1fc37b4-bce4-11e9-89e2-41e555e96722>.

177. See, e.g., Nylah Burton, *Meet the Young Activists of Color Who Are Leading the Charge Against Climate Disaster*, VOX (Oct. 11, 2019, 8:00 AM), <https://www.vox.com/identities/2019/10/11/20904791/young-climate-activists-of-color>; Rachel Janfaza, *9 Climate Activists of Color You Should Know*, TEEN VOGUE (Jan. 3, 2020), <https://www.teenvogue.com/story/youth-climate-activists-of-color>.

178. See, e.g., Sacchi et al., *supra* note 149; Jonathan Watts, *The Greta Thunberg Effect: At Last, MPs Focus on Climate Change*, THE GUARDIAN (Apr. 23, 2019, 2:56 PM), <https://www.theguardian.com/environment/2019/apr/23/greta-thunberg> [<https://perma.cc/2ES6-8AS7>].

and inequality, including racism.”¹⁷⁹ Hence, the youth climate movement does not “advocate making these systems sustainable. Their demand is climate justice.”¹⁸⁰ Tackling climate change means tackling the root causes of climate change and unraveling the systems and structures that not only give rise to the greenhouse gas emissions that physically alter the climate, but also to the social, political, and economic structures that perpetuate social inequality and ecological degradation.

In the United States, the tendrils of the youth movement now pervade every aspect of the climate movement. From the Fridays for Future protests,¹⁸¹ to structured political organizing,¹⁸² to legal advocacy, the youth climate movement is informing climate narratives and reshaping legal and political strategies.

One of the earliest and highest profile collective actions on the part of the U.S. youth climate movement is the Our Children’s Trust Litigation.¹⁸³

In 2015, twenty-one young people filed suit against the United States claiming that the federal government had violated their legal rights by knowingly contributing to climate change and failing to reduce domestic greenhouse gas emissions or otherwise address the causes and consequences of climate change.¹⁸⁴ In the ongoing *Juliana v. United States* litigation, the youth plaintiffs allege that the government has deprived them of their right to a safe climate without due process of law and thereby violated their constitutional rights of due process¹⁸⁵ and equal protection.¹⁸⁶ The plaintiffs also allege that the federal government is the sovereign trustee of the “country’s life-sustaining climate system” and has failed in its duty of care to present

179. Benjamin Bowman, *Fridays for Future: How the Young Climate Movement Has Grown Since Greta Thunberg’s Lone Protest*, THE CONVERSATION (Aug. 28, 2020), <https://theconversation.com/fridays-for-future-how-the-young-climate-movement-has-grown-since-greta-thunbergs-lone-protest-144781>.

180. *Id.*

181. *Id.* See also FRIDAYS FOR FUTURE, <https://fridaysforfuture.org> (last visited June 21, 2021).

182. Ella Nilsen, *The New Face of Climate Activism is Young, Angry — and Effective*, VOX (Sept. 17, 2019, 9:20 AM), <https://www.vox.com/the-highlight/2019/9/10/20847401/sunrise-movement-climate-change-activist-millennials-global-warming>.

183. For an overview of the organization, see OUR CHILDREN’S TRUST, <https://www.ourchildrenstrust.org> (last visited June 29, 2021).

184. First Am. Compl. at 92-93.

185. *Id.* at 84-88.

186. *Id.* at 88-92. Youth plaintiffs also alleged governmental violations of other unenumerated rights protected under the Ninth Amendment to the U.S. Constitution.

and future generations to “take affirmative steps to protect those trust resources.”¹⁸⁷ The core of the youths’ claims is that the government’s actions and inactions “have so profoundly damaged our home planet that they threaten Plaintiffs’ fundamental constitutional rights to life and liberty.”¹⁸⁸

The *Juliana* litigation pushes against the edges of constitutional law jurisprudence and seeks bold new declarations of federal failure and federal power.¹⁸⁹ At the core of the plaintiffs’ claims is the notion that climate change poses an immediate and existential threat to present and future generations and that the state must, in some meaningful way, be accountable for addressing this threat. Federal District Court Judge Anne Aiken affirmed this core assertion and responded to the youths’ claims by acknowledging the far-reaching failures of domestic environmental law¹⁹⁰ and finding that “the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.”¹⁹¹ This was a breathtaking finding.

The youths’ claims and Judge Aiken’s findings created a political flashpoint. Following numerous efforts on the part of the Trump Administration to kill the case, it finally ended up before the Ninth Circuit Court of Appeals in January 2020. In a 2:1 decision, the Ninth Circuit ordered the district court to dismiss the case for lack of standing. The Ninth Circuit held that the remedy sought by the plaintiffs—an order requiring the government to develop a plan to “phase out fossil fuel emissions and draw down excess atmospheric CO₂”—was beyond the constitutional power of the court.¹⁹² In so doing, however, the court affirmed the severity of the climate crisis, finding that the “[c]opious expert evidence establishes that this

187. *Id.*

188. *Id.* at 1261 n.28.

189. As relief, the plaintiffs asked the court to declare that the United States’ current environmental policy infringes upon their fundamental rights and to direct the federal government to take affirmative, enforceable steps to “swiftly phase out” greenhouse gas emissions and to take any other actions necessary to keep GHG concentrations in the atmosphere at a safe level. *Id.* at 4 n.45, 94–95. See also Daniel Farber, *What’s Wrong With Juliana (and What’s Right)*, CENTER FOR PROGRESSIVE REFORM: CPRBLOG (Jan. 22, 2019), www.progressivereform.org/CPRBlog.cfm?idBlog=A6644A55-9B8B-D096-2BF612F2E8FB772C.

190. Judge Aiken admonished the Federal Courts for being too “cautious and overly deferential in the arena of environmental law” and urged the judiciary to step into its “role as a coequal branch of government.” *Juliana v. United States*, 217 F. Supp. 3d 1224, 1262–63 (D. Or. 2015).

191. *Id.* at 1250.

192. *Juliana v. United States*, 947 F.3d 1159, 1172 (9th Cir. 2020).

unprecedented rise stems from fossil fuel combustion and will wreak havoc on the Earth's climate if unchecked."¹⁹³ Even as it denied its own ability to contend with the impending crisis, the Ninth Circuit warned that "it will be increasingly difficult . . . for the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions."¹⁹⁴

In a powerful dissent, Judge Staton denounced political and judicial inaction and declared that the young peoples' suit was necessary "to enforce the most basic structural principle embedded in our system of ordered liberty: that the Constitution does not condone the Nation's willful destruction."¹⁹⁵ Analogizing the court's delay in stepping in to recognize fundamental rights in the climate context to the failures of the court to step in earlier than it did with respect to desegregation, Judge Staton declared that:

To be sure, unless there is a constitutional violation, courts should allow the democratic and political processes to perform their functions. And while all would now readily agree that the 91 years between the Emancipation Proclamation and the decision in *Brown v. Board* was too long, determining when a court must step in to protect fundamental rights is not an exact science. In this case, my colleagues say that time is 'never'; I say it is now.¹⁹⁶

Judge Aiken's and Judge Staton's respective decisions and dissent reflect the frustration felt by the leaders of the youth climate movement. The state continues to prop up a system that perpetuates climate change. The state continues to fail to safeguard the fundamental rights of the people. The state's acts and omissions hurtle us to the brink of a crisis that compounds existing inequalities, and will disproportionately impact certain communities, including the youth and future generations.¹⁹⁷

193. *Id.* at 1166 (the court even goes so far as to state that "[a]bsent some action, the destabilizing climate will bury cities, spawn life-threatening natural disasters, and jeopardize critical food and water supplies").

194. *Id.* at 1175.

195. *Id.*

196. *Id.* at 1191.

197. At the time of writing, the *Juliana* litigation continues to percolate. For helpful information about past and pending actions, see U.S. Litigation Chart, *Juliana v. United States*, SABIN CENTER FOR CLIMATE CHANGE LAW, <http://climatecasechart.com/climate-change-litigation/case/juliana-v-united-states/> (last visited June 27, 2021). Numerous other climate cases brought by youth are now pending in the United States and around the world. See also

As the *Juliana* litigation wound its way through the courts, the youth climate movement swelled in the U.S. and worldwide. In 2017, in Washington State, Jamie Margolin began mobilizing a new youth climate organization, Zero Hour, and a national day of mass action for climate justice.¹⁹⁸ Zero Hour advances a platform that “specifies the need for climate justice, including equity, racial justice, and economic justice” and organizes climate education, political lobbying, and marches on the Capitol.¹⁹⁹ Also in 2017, on the East Coast, Varshini Prakash and her co-founders were launching the Sunrise Movement, a youth-led movement to stop climate change and reimagine and revitalize the economy in the process.²⁰⁰ Across the Atlantic, in 2018, 15-year old Greta Thunberg began skipping school to strike for climate action outside the Swedish parliament in Stockholm, leading to the creation of the international youth climate movement, Fridays for Future.²⁰¹ Along the edges of Lake Chad, Oladuso Adenike, who goes by the name “The Ecofeminist,” was forming the iLeadclimate movement, a panAfrican movement focused on the “restoration of Lake Chad, raising awareness about climate induced problems in conflict zones & African societies for disarmament, regional stability & the sustainence [sic] of livelihoods.”²⁰² Across the world, youth were forming a critical mass of resistance to political inaction on climate change. The roots of a movement were taking hold.

By March 2019, 1.4 million youth in 123 countries marched to demand climate action.²⁰³ In September 2019, just months before the global pandemic brought the world to a standstill, the United Nations

Matthew Taylor et al., *The Young People Taking Their Countries to Court Over Climate Inaction*, THE GUARDIAN (May 7, 2021), <https://www.theguardian.com/environment/2021/may/07/the-young-people-taking-their-countries-to-court-over-climate-inaction>.

198. See *Who We Are: Our Story*, ZERO HOUR, <http://thisiszerohour.org/who-we-are/> (last visited June 21, 2021). See also Alexandra Yoon-Hendricks, *Meet the Teenagers Leading a Climate Change Movement*, N.Y. TIMES (July 21, 2018), <https://www.nytimes.com/2018/07/21/us/politics/zero-hour-climate-march.html>.

199. Kristen Doerer, *Youth Climate Change Activists Marched on Washington, D.C.*, TEEN VOGUE (July 22, 2018), <https://www.teenvogue.com/story/youth-climate-change-activists-marched-washington-dc>.

200. See *Sunrise Principles*, SUNRISE MOVEMENT, <https://www.sunrisemovement.org/principles/?ms=Sunrise%27sPrinciples> (last visited July 21, 2021).

201. See *Youth for Climate Action*, UNICEF, <https://www.unicef.org/environment-and-climate-change/youth-action> (last visited July 21, 2021).

202. *About iLeadClimate*, WOMEN AND CRISIS, <https://www.womenandcrisis.com/p/about.html> (last visited July 21, 2021).

203. See Eliza Barclay & Kainaz Amaria, *Photos: Kids in 123 Countries Went on Strike to Protect the Climate*, VOX (Mar. 17, 2019), <https://www.vox.com/energy-and-environment/2019/3/15/18267156/youth-climate-strike-march-15-photos>.

held the first ever Youth Climate Summit.²⁰⁴ Even as the pandemic wrought devastation globally, the youth movement maintained momentum.²⁰⁵ As Sunrise co-founder Prakash emphasized, the youth knew that they needed to build and maintain a powerful movement. They knew that addressing climate change “would take a movement unlike what we’ve seen in probably half a century to build enough power to govern for enough time to get us there.”²⁰⁶ And that is what they have set out to achieve – a new, indomitable social movement intent on achieving the deep structural change needed to address climate change and “save humanity.”²⁰⁷

In the U.S., the Sunrise Movement epitomizes this new form of environmental mobilization.²⁰⁸ It is a self-defined youth movement that is: “building an army of young people to make climate change an urgent priority across America, end the corrupting influence of fossil fuel executives on our politics, and elect leaders who stand up for the health and wellbeing of all people.”²⁰⁹

Sunrise operates based on a set of shared principles that prioritize inclusivity, experimental activism, and non-violence. The movement is intentionally intersectional and actively oriented towards working in solidarity with other social movements with the goal of not only stopping climate change but doing so while fighting “for the liberation of all people.”²¹⁰ Sunrise builds on the rich history

204. U.N. Youth Climate Summit (September 20, 2019), <https://www.un.org/development/desa/youth/news/2019/09/youth-climate-summit/>.

205. See YCC Team, *Social Media Savvy Youth Climate Movement Isn't Stopping for Covid-19*, YALE CLIMATE CONNECTIONS (June 6, 2020), <https://yaleclimateconnections.org/2020/06/social-media-savvy-youth-climate-movement-isnt-stopping-for-covid-19/>.

206. Ezra Klein, “No Permanent Friends, No Permanent Enemies”: Inside the Sunrise Movement’s Plan to Save Humanity, VOX (July 21, 2019, 11:10 AM), <https://www.vox.com/ezra-klein-show-podcast/2019/7/31/20732041/varshini-prakash-sunrise-movement-green-new-deal>.

207. *Id.*

208. See Nilsen, *supra* note 182; Klein, *supra* note 206; KK Ottesen, “Adults Are Asleep at the Wheel” in Climate Crisis, Says Co-Founder of Youth-Led Activist Group, WASH. POST (Sept. 22, 2020, 9:31 AM), https://www.washingtonpost.com/lifestyle/magazine/adults-are-asleep-at-the-wheel-in-climate-crisis-says-co-founder-of-youth-led-activist-group/2020/09/21/960327f0-e7ac-11ea-bc79-834454439a44_story.html.

209. *About the Sunrise Movement*, SUNRISE MOVEMENT, <https://www.sunrisemovement.org/about/?ms=AboutTheSunriseMovement> (last visited June 21, 2021). See also Nilsen, *supra* note 182 (noting that “The new face of climate resistance is young and diverse. It is scared, and it is loud.”).

210. *Sunrise Principles*, *supra* note 200 (“We aim to abolish or reimagine institutions that degrade our communities and our climate. That requires working together to win and hold power at every level of government and society. We work with movements who share our values of transforming our country.”).

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of social protest in the United States to effect change. Members weave together traditional forms of protest and civil disobedience with the savvy use of social media to amplify their voices, connect with activists around the world, and shape the legal and political process.²¹¹ As Nilsen describes:

Their methods are straight out of the playbook of the civil rights movement of the 1960s: Frequently, they sing protest songs. They stand quietly as police officers zip-tie their hands behind their backs and lead them into vans for civil disobedience. Their eyes pleading, they carry signs, including ones that say, “The Youth are Coming for You.”²¹²

Alongside active protest, however, Sunrise also works with political leaders to shape legal and political agendas. In fact, Sunrise has been credited with making “the Green New Deal a household term,” and being “the reason CNN and MSNBC [hosted] the 2020 Democrats for forums all about climate change.”²¹³ Since its inception in 2017, the Sunrise Movement has set about to advance a Green New Deal in Congress and has actively courted and endorsed politicians,²¹⁴ sought to influence elections, and offered political mandates for change.²¹⁵ Instead of eschewing governmental action and political cooperation and compromise, Sunrise embraces the idea “that to achieve transformations on the scale of stopping climate change, it would take decades of massive government-led action at every level of society.”²¹⁶ As Prakash describes, the movement embraces the necessity of political engagement:

We have this principle that we employ: no permanent friends, no permanent enemies . . . we need to engage with politicians for us to actually address climate change, but at the same time, even if we are

211. See Emma Marris, *Why Young Climate Activists Have Captured the World's Attention*, NATURE (Sept. 18, 2019), <https://www.nature.com/articles/d41586-019-02696-0> (“The movement’s visibility on social media and in the press has created a feedback loop. ‘Young people are getting so much attention that it draws more young people into the movement.’” (quoting Dana Fisher)).

212. Nilsen, *supra* note 182.

213. Klein, *supra* note 206.

214. *E.g.*, Alexandria Ocasio-Cortez for NY-14, SUNRISE MOVEMENT, https://www.sunrisemovement.org/our_endorsements/alexandria-ocasio-cortez-for-ny-14/ (last visited June 21, 2021).

215. CLIMATE MANDATE, <https://climatemandate.org> (last visited June 21, 2021).

216. Klein, *supra* note 206 (quoting Varshini Prakash).

allied with somebody like Alexandria Ocasio-Cortez in this instant, that doesn't necessarily mean that we will in the future. We see it as essential to engage with the political system, but we also see Sunrise's role as being on the vanguard of the movement ecosystem writ large.²¹⁷

The Sunrise Movement represents a new form of social activism. It draws from the long history of social movements and social protest in the United States but deviates from the environmental movements of the past.²¹⁸ It is younger, more diverse, more intentionally and actively intersectional, and more inclusive.²¹⁹ It emphasizes the importance of working alongside other social movements, as well as finding congressional and political allies to advance the Movement's cause. Through its activism on the outside and its political allies on the inside, Sunrise is fighting to bring about a climate revolution.²²⁰

Sunrise is not alone in revolutionizing how we think about and respond to climate change. Alongside Sunrise, Our Children's Trust, Zero Hour, and Fridays for Future, a host of other young leaders are centering themselves as powerful voices for climate action.²²¹ Their message is beginning to resonate in the courts, on the streets, and even in the hallways of power – including at the White House.

On January 29, 2021, less than ten days after his inauguration, President Biden began taking concrete steps to prioritize climate change. In an executive order entitled *Tackling the Climate Crisis at Home and Abroad* [hereinafter *Tackling the Climate Crisis*], President Biden stated that “the United States and the world face a profound

217. *Id.*

218. See, e.g., Ray Levy Ueda, *The Red Deal is an Indigenous Climate Plan That Builds on the Green New Deal*, TEEN VOGUE (Nov. 1, 2019), <https://www.teenvogue.com/story/red-deal-indigenous-climate-plan-green-new-deal-red-nation> (describing the Sunrise Movement as “built upon organizing knowledge of Native, black, and brown communities”).

219. See K-Sue Park, *This Land Is Not Our Land*, 87 U. CHI. L. REV. 1977, 2023 (2020) (“While this movement’s most famous face may be Greta Thunberg’s, it is constituted overwhelmingly by Indigenous youth and youth of color, who are more likely to find their inheritances and inspiration in the long legacies and resilience of Indigenous people and people of color who have defended their communities and the Earth.”).

220. *We Are the Climate Revolution*, SUNRISE MOVEMENT, <https://www.sunrise-movement.org/?ms=SunriseMovement-WeAreTheClimateRevolution> (“We are the Climate Revolution”) (last visited June 21, 2021).

221. See, e.g., Katherine Bagley, *From a Young Climate Movement Leader, a Determined Call for Action*, YALE ENVIRONMENT 360 (Nov. 7, 2019), <https://e360.yale.edu/features/from-a-young-climate-movement-leader-a-determined-call-for-action>; *A Note From the Peoples Climate Movement*, PEOPLES CLIMATE MOVEMENT, <https://peoplesclimate.org> (last visited June 21, 2021).

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climate crisis” and ordered that the climate crisis be placed “at the center of United States foreign policy and national security.”²²² President Biden further declared that:

It is the policy of my Administration to organize and deploy the full capacity of its agencies to combat the climate crisis to implement a Government-wide approach that reduces climate pollution in every sector of the economy; increases resilience to the impacts of climate change; protects public health; conserves our lands, waters, and biodiversity; *delivers environmental justice*; and spurs well-paying union jobs and economic growth.²²³

With one broad brush stroke, President Biden redefined the United States’ approach to climate change and created a rough but potentially progressive blueprint for achieving real change. In doing so, President Biden prioritized environmental justice, stating that “[t]o secure an equitable economic future, the United States must ensure that environmental and economic justice are key considerations in how we govern.”²²⁴

This emphasis on environmental justice represents an important inflection point in domestic climate law and environmental law more broadly. For the first time, environmental justice was fixed as a focal point and guiding principle for executive environmental decision-making. To this end, President Biden also used the *Tackling the Climate Crisis* to establish what would become the White House Environmental Justice Advisory Council (WHEJAC).²²⁵ Two months

222. *Executive Order on Tackling the Climate Crisis at Home and Abroad*, THE WHITE HOUSE (Jan. 22, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>.

223. *Id.* (emphasis added).

224. *Id.* at Sec. 219.

225. As Cecilia Martinez said, the creation of the WHEJAC was “a historic moment that environmental justice communities have been working toward for decades. President Biden and Vice President Harris are, for the first time ever, bringing the voices, perspectives, and expertise of environmental justice communities into a formal advisory role at the White House.” *White House Announces Environmental Justice Advisory Council Members*, THE WHITE HOUSE (Mar. 29, 2021), <https://www.whitehouse.gov/ceq/news-updates/2021/03/29/white-house-announces-environmental-justice-advisory-council-members/>. Of note, President Biden’s efforts to integrate environmental justice more deeply within his Administration also include efforts to recognize and respond to questions of energy justice, including through the appointment of energy justice scholar, Professor Shalanda H. Baker as the Secretarial Advisor on Equity and as Deputy Director for Energy Justice in the Office of Economic Impact and Diversity at the U.S. Department of Energy. *Shalanda H. Baker*, Energy.gov, <https://www.energy.gov/person/shalanda-h-baker> (last visited May 25, 2021); SHALANDA BAKER, REVOLUTIONARY POWER: AN ACTIVIST’S FIELD GUIDE TO THE ENERGY TRANSITION

later, on March 29, 2021, the White House announced the members of WHEJAC. Among the named members was Jerome Foster.²²⁶

At the time of his appointment, Jerome Foster was an eighteen-year-old climate activist from New York.²²⁷ Beginning in 2019, for fifty-eight consecutive Fridays, Foster protested outside the White House holding a placard that read “School strike for climate.”²²⁸ From these solo protests, Foster joined together with other young people to found an intersectional youth voting advocacy organization, OneMillionOfUs,²²⁹ and the Climate Reporter, a youth-led climate news outlet.²³⁰ Out of these cumulative efforts and buoyed by the rising youth climate movement, in 2021, Foster was “ushered into the seat of American power to help craft climate policy.”²³¹

Foster’s appointment to WHEJAC is a testament to the collective power and persistence of the youth climate movement. It is far from a guarantee of transformative change. It is, however, evidence that the energy, momentum, and solidarity of the swelling youth and climate justice movements can lead to change, maybe even transformative change.

B. *Democracy Re-Envisioned: The Voices of the Historically Excluded*

The strategies and successes of the youth climate movement build on a legacy of activism and social movements in the United States. From the Civil Rights Movement and the Movement for Black Lives to the LGBTQ rights movement, social movements are not just part of the fabric of U.S. life and law, they are the forces that “galvanize hope and collective action,” that “project new possible futures,” and that allow us to imagine “what we think is possible both within and outside of the law.”²³²

(2021).

226. *White House Announces Environmental Justice Advisory Council Members*, *supra* note 225.

227. *See id.*; Oliver Milman, *‘I’m Hopeful’: Jerome Foster, the 18-Year-Old Helping to Craft US Climate Policy*, *THE GUARDIAN* (Apr. 13, 2021, 2:00 AM), <https://www.theguardian.com/us-news/2021/apr/13/jerome-foster-us-biden-climate-crisis>.

228. Milman, *supra* note 227.

229. *Jerome Foster II: Climate Justice Activist and Executive Director, OneMillionOfUs*, *N.Y. TIMES: CLIMATE HUB*, <https://climatehub.nytimes.com/speaker/343828/jerome-foster-ii> (last visited Apr. 16, 2022).

230. Milman, *supra* note 227.

231. *Id.*

232. Akbar, Ashar & Simonson, *supra* note 29, at 827–28.

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In the environmental and climate context, the youth movement draws strength and solidarity from the environmental justice movement and from Indigenous peoples' movements, which have long been struggling "for sovereignty, dignity, and justice for their communities."²³³ As both the environmental justice and Indigenous peoples' movements underscore:

Racialized communities are the canaries in the coal mine. They are the first to suffer the ravages of climate change, but their plight is a harbinger of the harm that will befall everyone if we do not take prompt action to transform the laws, policies, institutions, and mindsets that produce reckless extraction of the planet's resources.²³⁴

Among those communities most severely impacted by both patterns of environmental degradation and climate change are Black, Brown, and Indigenous communities. The environmental justice movement draws attention to how federal environmental law "fail[s] to address the ways that environmental harms disproportionately affect low-income people, especially low-income people of color,"²³⁵ and the movement has expanded to include calls for climate justice.²³⁶ Alongside and intersecting with the environmental justice movement, Indigenous peoples organizations, such as the Indigenous Environmental Network²³⁷ and the Red Nation,²³⁸ are leading efforts to protect their lands, people, and ways of life from the ongoing destruction wrought by intersecting political, economic, and ecological crises.²³⁹

233. Lauren Cooper, *Native American Activism: 1960s to Present*, ZINN EDUCATION PROJECT, <https://www.zinnedproject.org/materials/native-american-activism-1960s-to-present/> (last visited June 22, 2021). See also Elizabeth Kronk Warner, *The Indigeneity of Environmental Justice: A Case Study*, in THE CAMBRIDGE HANDBOOK ON ENV'T JUST. AND SUSTAINABLE DEV. (Sumudu Atapattu, Carmen G. Gonzalez & Sara Seck eds., 2021).

234. Carmen G. Gonzalez, *Climate Lawyers as Movement Lawyers (and Vice Versa)*, ASIL ANN. MEETING PRO. (2021).

235. Uma Outka & Elizabeth Kronk Warner, *Reversing Course on Environmental Justice Under the Trump Administration*, 54 WAKE FOREST L. REV. 393, 394 (2019).

236. See, e.g., *Environmental & Climate Change*, NAACP, <https://www.naacp.org/issues/environmental-justice/> (last visited June 22, 2021).

237. *Our History*, INDIGENOUS ENVIRONMENTAL NETWORK, <https://www.ienearth.org/about/> (last visited June 22, 2021).

238. *About*, THE RED NATION, <https://therednation.org/about/> (last visited June 22, 2021).

239. For an important reminder of the role that Indigenous peoples play in the environmental justice movement, see Park, *supra* note 219, at 2022 ("The struggles of

These efforts are far-reaching. They seek acknowledgment of the long history of oppression and devastation that Indigenous peoples have suffered at the hands of the state. They also underscore the present-day persistence of these patterns through the siting of fossil fuel infrastructure and the disproportionate impact that climate change poses to Indigenous communities. Indigenous peoples face a two-front climate battle. Even as they fight to stop the construction of new oil and gas pipelines through the centers and sacred sites of their communities, so too do they confront the reality that many Indigenous peoples are often more vulnerable to the effects of climate change as a result of their intimate relationship with the lands they inhabit.²⁴⁰ Climate change compounds threats for Indigenous peoples “who have spent much of their entire existence fending off colonization, assimilation, and attempts at genocide.”²⁴¹

In this era of intensified risk and persistent state failure, Indigenous movements worldwide are fighting to resist patterns of oppression and exclusion, and to assert their rights to self-determination and sovereignty. In the case of climate change, Indigenous people are fighting for recognition of their rights to property, culture, subsistence, and entire ways of life.²⁴² In the United States, Indigenous activists are leading efforts to resist the construction of oil and gas pipelines,²⁴³ to protect water, air, and

Indigenous peoples,’ too, have indeed been at the heart of the environmental justice movement for centuries, but at their heart have also always been Indigenous leaders, and especially women and youth, who all too frequently go unnamed and unrecognized by people outside of their own communities.”).

240. See U.N. PERMANENT FORUM ON INDIGENOUS ISSUES, CLIMATE CHANGE AND INDIGENOUS PEOPLES, <https://perma.cc/C9CB-2RDP>; Tsosie, *supra* note 5, at 1628; M. Alexander Pearl, *Human Rights, Indigenous Peoples, and the Global Climate Crisis*, 53 WAKE FOREST L. REV. 713, 713-14 (2018) (“In general, Indigenous peoples have a comprehensive relationship with their place and surroundings, which incorporates culture, livelihood, economy, and a defining sense of self. Land and resources are not simply commodities to be bought and sold, but they function to give us our stories, directions, and identity. With many Indigenous peoples existing in remote areas, the effects of climate change—like sea level rise and changing rainfall—have an enhanced negative effect. Indigenous relationships with land renders what is [sic] at stake all the more dire.”).

241. Pearl, *supra* note 240, at 716-17.

242. See, e.g., G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007); *Inuit Petition*, *supra* note 149; see also Benedict Kingsbury, “*Indigenous Peoples*” in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT’L L. 414 (1998); Erica-Irene A. Daes, *Equality of Indigenous Peoples Under the Auspices of the United Nations - Draft Declaration on the Rights of Indigenous Peoples*, 7 ST. THOMAS L. REV. 493 (1995).

243. See generally NICK ESTES, OUR HISTORY IS THE FUTURE: STANDING ROCK VERSUS THE DAKOTA ACCESS PIPELINE, AND THE LONG TRADITION OF INDIGENOUS RESISTANCE (2019).

land,²⁴⁴ and to advance new visions for what a just and equitable society requires.²⁴⁵

Indigenous peoples have been at the forefront of environmental and climate activism for decades. The perspectives and focus of Indigenous activism are tremendously varied.²⁴⁶ In the context of domestic climate activism, however, Indigenous peoples' movements coalesce around three critical areas explored here.²⁴⁷ First, Indigenous activism has drawn attention to the relationship between climate change and human rights. Second, Indigenous leaders have led the charge nationwide to oppose the construction of new fossil fuel pipelines, as well as to protect vital lands and waters. Third, Indigenous leaders are asserting a new form of radical Indigenous resistance and a call for action—the Red Deal—that demands a renewed movement for justice and sets forth a “program for

244. See Park, *supra* note 220, at 2022-23. Park concisely summarized a handful of the ways in which Indigenous peoples have been at the forefront of environmental justice activism:

Standing Rock youth initiated the NoDAPL direct action protests; LaDonna Brave Bull Allard and Joye Braun of the Indigenous Environmental Network then established the water protectors' camp, while David Archambault II led the Standing Rock Sioux Tribe through that period. In July 2015, leaders from the Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, Pueblo of Zuni, and Ute Indian Tribe formed the Bears Ears Inter-Tribal Coalition to protect the sacred, spiritual, historical, natural, scientific and cultural resources of the lands. That coalition and the nonprofit Utah Diné Bikéyah have been fighting against Trump's reduction of the monument.

See also Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, 53 HARV. C.R.-C.L. L. REV. 213 (2018).

245. See Melanie Yazzie, *The Red Deal-September 2019 Draft*, THE RED NATION (Sept. 22, 2019), <https://therednationdotorg.wordpress.com/2019/09/22/the-red-deal/> [hereinafter Yazzie, *The Red Deal*].

246. See Kristen Carpenter & Alexey Tsykarev, *Indigenous Peoples and Diplomacy on the World Stage*, 115 AJIL UNBOUND 118 (2021); Claire Charters, *The Sweet Spot Between Formalism and Fairness: Indigenous Peoples' Contribution to International Law*, 115 AJIL UNBOUND 123, 125 (2021) (noting that “Indigenous Peoples have a specific platform in which their representatives participate alongside state representatives to influence climate change norms and policies.”). Here, also recognize that Indigeneity “is not a fixed identity, but a political practice—the work of preserving and proliferating relationships between peoples and land that are not reducible to, remain outside of, and continuously challenge colonial modernity.” Sherally Munshi, *Unsettling the Border*, 67 UCLA L. REV. 1720, 1737 (2021).

247. These three broad areas of activism are far from the only spaces in which Indigenous peoples are active. See, e.g., *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 854 (9th Cir. 2012) (in which the Native Village of Kivalina and the City of Kivalina sued two dozen fossil fuel companies for their contributions to climate change and the corresponding damage to the village, alleging a public nuisance under federal common law).

Indigenous liberation, life, and land.”²⁴⁸

While the relationship between human rights and the environment has been recognized since the emergence of international environmental law,²⁴⁹ very little was done in the early years to respond to these linkages. As patterns of environmental degradation intensified, however, small inroads were made. In 1994, then-U.N. Special Rapporteur on Human Rights and the Environment, Fatma Zohra Ksentini, presented the first Draft Declaration on Principles of Human Rights and the Environment,²⁵⁰ which proposed a new category of human rights that would recognize a right to a safe and healthy environment. The proposal failed to gain traction. Over time, the linkages between environmental quality and human rights have become clearer and climate change has brought renewed attention to the need for urgent action at the intersection of human rights and the environment.²⁵¹

As awareness of these linkages grows, so too do efforts to respond to them.²⁵² We thus find ourselves in the midst of a climate rights

248. *The Red Deal: Indigenous Action to Save Our Earth*, COMMON NOTIONS, <https://www.commonnotions.org/the-red-deal>.

249. See *The Stockholm Declaration*, *supra* note 85. See also Boyle, *The Role*, *supra* note 154, at 44, 49, 63 (Between the 1972 Stockholm Conference and the 1992 UN Conference on Environment and Development in Rio de Janeiro, the environmental debate began focusing on economic development rather than human rights. As a result, the “initial emphasis on a human rights perspective [was not] maintained” in the 1992 Rio Declaration, which “[a]void[ed] the terminology of rights altogether” and, instead, declared that “[h]uman beings are at the centre of concerns for sustainable development.”).

250. Fatma Zohra Ksentini (Special Rapporteur on Human Rights and the Environment), *Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned*, U.N. Doc. E/CN.4.Sub.2/1994/9, annex I (July 6, 1994).

251. *About Human Rights and the Environment*, OHCHR, <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/AboutHRandEnvironment.aspx> [<https://perma.cc/VW4L-7HYX>]; David R. Boyd (Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment), *Report on Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc. A/74/161, at 2 (July 15, 2019), <https://undocs.org/A/74/161> (noting the “devastating effects of the current global climate emergency on the enjoyment of human rights”).

252. On October 5, 2021, the UN Human Rights Council finally recognized the human right to a safe, clean, healthy, and sustainable environment. Human Rights Council, *The Human Right to a Safe, Clean, Healthy and Sustainable Environment*, A/HRC/48/L.23/Rev.1 (Oct. 5, 2021), <https://daccess-ods.un.org/tmp/8167235.85128784.html> (the Council “[r]ecognizes the right to a safe, clean, healthy and sustainable environment” and “[e]ncourages States: . . . [t]o adopt policies for the enjoyment of the right to a safe, clean, healthy and sustainable environment as appropriate, including with respect to biodiversity and ecosystems,” and “[i]nvites the General Assembly to consider the matter.”).

revolution.²⁵³ Indigenous activism helped activate this revolution. In 2005, Sheila Watt-Cloutier, a Canadian Inuit activist and then Chair of the Inuit Circumpolar Conference, filed a petition with the Inter-American Commission on Human Rights (IACHR) on behalf of herself and 62 other named Inuit petitioners alleging that the “impacts of climate change, caused by acts and omissions by the United States, violate the Inuit’s fundamental human rights protected by the American Declaration of the Rights and Duties of Man and other international instruments.”²⁵⁴ The petition alleged that the United States’ failure to curb its greenhouse gas emissions was leading to climate change, which in turn violated the Inuit’s human rights, including their rights to property, culture, and subsistence.²⁵⁵

Although the IACHR declined to rule on the complaint, in February 2007, the Commission invited the petitioners to provide testimony on the links between climate change and human rights.²⁵⁶ The testimony provided during these hearings helped identify the connections between climate change and human rights and kick started a tidal wave of efforts to respond to these connections.²⁵⁷ Subsequently, in November 2007, leaders from some of the world’s most vulnerable Small Island Developing States met in the Maldives to explore the human rights-climate change relationship. The result of this meeting, the Malé Declaration on the Human Dimension of Climate Change, “stated explicitly, and for the first time in an international agreement, that ‘climate change has clear and immediate implications for the full enjoyment of human rights’ and called on the United Nations human rights system to address the issue as a matter of urgency.”²⁵⁸ This was a watershed moment in

253. See Cinnamon Carlarne, *Climate Change, Human Rights, & The Rule of Law*, *supra* note 155; Setzer & Byrnes, *supra* note 163 (“A human rights basis for litigation on climate change has had increasing resonance with judges.”).

254. *Inuit Petition*, *supra* note 149, at 5.

255. *Id.*

256. See Timo Koivurova, *International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects*, 22 J. ENV’T L. & LITIG. 267, 285–95 (2007).

257. See Inter-American Commission on Human Rights, Letter: *Global Warming and Human Rights – 127th Ordinary Period of Sessions* (Feb. 1, 2007), available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2007/20070201_na_reply.pdf; Earthjustice, *Testimony of Martin Wagner Before the Inter-American Commission on Human Rights* (March 1, 2007), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2007/20070301_na_na-1.pdf.

258. Marc Limon, *Human Rights Obligations and Accountability in the Face of Climate Change*, 38 GA. J. INT’L & COMP. L. 543, 547 (2010) (quoting *Malé Declaration on the Human Dimension of Climate Change*, CTR. FOR INT’L ENV’T L. (Nov. 14, 2007),

climate law.

Even as Indigenous leaders fight for recognition of their human rights, they are battling against the construction of new fossil fuel infrastructure that will further exacerbate climate change. Most notably, Indigenous leaders have led efforts to halt the Keystone XL pipeline, the Dakota Access Pipeline (DAPL), and the replacement of Line 3 in Northern Minnesota.²⁵⁹ The disputes over the approval and siting of these large-scale pipeline projects are only the most recent in a long history of the fossil fuel industry inflicting “slow violence” on “racialized and poor communities all over the world.”²⁶⁰ As Gunn-Wright explains:

Most fossil fuel infrastructure in our country is sited in poor neighborhoods that are majority Black and Brown, majority people of color. Facilities aren't in those communities for no reason. It's because those people have less power. The most heinous examples of what burning fossil fuels do to people are sequestered in communities where people aren't believed. Native folks in the U.S. and internationally have been on the front line, protecting really vital natural resources.²⁶¹

The environmental justice movement has been fighting for decades

http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf [<https://perma.cc/8MKU-MJZY>].

259. See, e.g., *Indigenous Env't Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561, 572 (D. Mont.), *order amended and supplemented*, 369 F. Supp. 3d 1045 (D. Mont. 2018), *appeal dismissed*, No. 18-36068, 2019 WL 2542756 (9th Cir. June 6, 2019); Justin Worland, *What to Know About the Dakota Access Pipeline Protests*, TIME (Oct. 28, 2016, 4:02 PM), <https://time.com/4548566/dakota-access-pipeline-standing-rock-sioux/>; Hiroko Tabuchi, Matt Furber & Coral Davenport, *Police Make Mass Arrests at Protest Against Oil Pipeline*, N.Y. TIMES (June 9, 2021), <https://www.nytimes.com/2021/06/07/climate/line-3-pipeline-protest-native-americans.html>. See also generally Jessica A. Shoemaker, *Pipelines, Protest, and Property*, 27 GREAT PLAINS RES. 69, 74, 76–77 (2017).

260. Gonzalez, *Migration*, *supra* note 3, at 409. Gonzalez explains:

From petroleum development by Chevron/Texaco in Ecuador to Cancer Alley in Louisiana, the extraction, processing, transportation, refining, and combustion of fossil fuels has placed disproportionate environmental burdens on racialized communities in both affluent and poor countries. These burdens include pervasive contamination of land, air, and water; loss of subsistence fishing and hunting rights; eviction from ancestral lands; fires, explosions, and industrial accidents; violation of Indigenous treaty rights and land ethics; and exposure to toxic chemicals.

261. Jillian Goodman, *Want to Fix the Climate Crisis? Start Listening to Black People*, BLOOMBERG GREEN (July 29, 2020, 6:00 AM), <https://www.bloomberg.com/news/articles/2020-07-29/want-to-fix-the-climate-crisis-start-listening-to-black-people> (quoting Rhiana Gunn-Wright).

to disrupt these patterns. Indigenous peoples, long leaders in resistance movements,²⁶² including the environmental justice movement,²⁶³ are leading efforts to stop the construction of fossil fuel infrastructure that would run through sacred lands and water and deepen dependency on the very sources of energy that contribute to climate change.²⁶⁴

The high-profile Dakota Access Pipeline Protests, or #NoDAPL,²⁶⁵ are only the latest in a long history of Indigenous-led protests against the fossil fuel industry.²⁶⁶ In July 2014, Energy Transfer Partners announced plans to construct a 1,172-mile pipeline transporting oil from the Bakken formation in North Dakota to an oil terminal in Illinois.²⁶⁷ Along the way, the pipeline, known as the Dakota Access Pipeline, would cross through South Dakota and Iowa. After rejecting alternative routes, including one that would see the pipeline route pass near the town of Bismarck, North Dakota, Energy Transfer settled on a route that would direct the pipeline along the edge of the Standing Rock Sioux Indian Reservation in North Dakota.²⁶⁸ This

262. See generally LEANNE BETASAMOSAKE SIMPSON, *AS WE HAVE ALWAYS DONE: INDIGENOUS FREEDOM THROUGH RADICAL RESISTANCE* (2017).

263. See, e.g., Park, *supra* note 220, at 1977.

264. See Saul Elbein, *These Are the Defiant “Water Protectors” of Standing Rock*, NAT’L GEOGRAPHIC (Jan. 26, 2017), <https://www.nationalgeographic.com/culture/article/tribes-standing-rock-dakota-access-pipeline-advancement?loggedin=true>.

265. See #NODAPL ARCHIVE - STANDING ROCK WATER PROTECTORS, <https://www.nodaplarchive.com> (last visited June 24, 2021) [hereinafter #NODAPL ARCHIVE].

266. #NoDAPL is one of the highest profile Indigenous-led resistance movements in recent times, but it is also “simply another in a long line of civil resistance struggles Native communities have mobilized, often successfully, to claim their rights.” Molly Wallace, *What Can be Learned From the Movement to Stop the Dakota Access Pipeline*, OPEN DEMOCRACY (Aug. 27, 2017), <https://www.opendemocracy.net/en/transformation/why-Indigenous-civil-resistance-has-unique-power/>.

267. For Energy Transfer Partners’ framing of the pipeline, see *Moving America’s Energy: The Dakota Access Pipeline*, ENERGY TRANSFER, <https://www.daplpipefacts.com> (last visited June 24, 2021).

268. See Carla F. Fredericks et al., *Social Cost and Material Loss: The Dakota Access Pipeline*, 22 N.Y.U. J. LEGIS. & PUB. POL’Y 563, 569 (2020) (“One of the proposed routes went ten miles north of Bismarck, the capital of North Dakota, which in 2017 had a population that was over ninety percent white. In the initial approval phase, USACE eliminated this route for several reasons, including its proximity to wellhead source water protection areas, which created a threat to Bismarck’s water supply. USACE did not show similar concern for the Tribe’s water source when they approved the route that went directly under Lake Oahe . . .”). See also *Background on the Dakota Access Pipeline*, LRINSPIRE (Aug. 15, 2016), <https://lrinspire.com/2016/08/15/background-on-the-dakota-access-pipeline/> (noting that the pipeline passes “less than one half mile from the Tribe’s reservation border, and thus the Tribe maintains a sovereign interest in protecting its cultural resources and patrimony that remain with the land. In addition, all along the route of the pipeline are sites of religious and cultural significance to our people – including burial sites of our ancestors. The pipeline

route takes the pipeline through sacred Dakota and Lakota lands, and “directly under Lake Oahe on the Missouri River, which is the Standing Rock Sioux Tribe’s main source of water for drinking, irrigation, and business uses.”²⁶⁹ Against Tribal objection, in early 2016, the U.S. Army Corps of Engineers (Corps) granted Energy Transfer an easement that allowed the pipeline to pass under Lake Oahe.²⁷⁰ Pipeline construction began soon thereafter, leading to one of the largest mass gatherings of Indigenous activists and their allies in modern history.²⁷¹

Responding to what they perceived as a failure to engage with the Tribes in meaningful consultation and an immediate threat to their waters, land, and culture, the Standing Rock Sioux and allied organizations began a multi-year, multi-front protest campaign or, as activists framed it, a protection campaign.²⁷² By mid-2016:

[T]he protests had evolved into full-time encampments on and off the reservation, supported by vibrant, effective, and headline-grabbing actions across the country and around the world. These actions included marches, letter-writing campaigns, divestment campaigns, bank shutdowns, elaborate banner drops, blockades, and sabotage of ETP property and pipeline construction equipment.²⁷³

Over time, the protests grew to include thousands of people, and localized protests expanded to become a global movement inspiring anti-pipeline, climate justice protests worldwide.²⁷⁴ As the #NoDAPL

would cross the Tribe’s traditional and ancestral lands and the construction of the pipeline jeopardizes many sacred places.”).

269. Fredericks et al., *supra* note 268.

270. U.S. Army Corps of Engineers’ Notice Regarding Recently Issued Public Documents, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101 (D.D.C. 2017) (No. 16-cv-1534).

271. See, e.g., John Paul Brammer, Opinion, *Latinos, We Are Indigenous, the #NoDAPL Fight is Ours as Well*, NBC NEWS (Oct. 10, 2016), <https://www.nbcnews.com/storyline/hispanic-heritage-month-2016/opinion-latinos-we-are-Indigenous-nodapl-fight-ours-well-n662201>.

272. Iyuskin American Horse, *We Are Protectors, Not Protesters’: Why I’m Fighting the North Dakota Pipeline*, THE GUARDIAN (Aug. 8, 2016, 11:06 AM), <https://www.theguardian.com/us-news/2016/aug/18/north-dakota-pipeline-activists-bakken-oil-fields> (“We are not protesters. We are protectors.”).

273. Rabbit, *The #NoDAPL Movement was Powerful, Factual, and Indigenous-Led. Lawsuit Lies Can’t Change That*, CTR. FOR CONST. RTS. (Feb. 21, 2018), <https://ccrjustice.org/home/blog/2018/02/21/nodapl-movement-was-powerful-factual-and-Indigenous-led-lawsuit-lies-can-t>.

274. See Troy A. Eid, *Beyond Dakota Access Pipeline: Energy Development and the*

protests were waged, the Standing Rock Sioux Tribe simultaneously pursued legal action to halt the Pipeline. In July 2016, the Standing Rock Sioux Tribe filed suit in the United States District Court for the District of Columbia alleging that the Corps was violating numerous federal statutes, including the National Historic Preservation Act, the National Environmental Policy Act, the Clean Water Act, and the Rivers and Harbors Act, and seeking declaratory and injunctive relief that would bring a halt to pipeline construction.²⁷⁵

Over the next five years, the legal battle over DAPL²⁷⁶ “wound its way through myriad twists and turns.”²⁷⁷ As presiding District Judge James A. Boasberg describes, despite the “Tribes’ plight, as well as their understandable frustration with a political process in which they all too often seem to come up just short” and despite the “headlines and controversy that this litigation has spawned,” it resulted in few “tangible consequences for the pipeline itself.”²⁷⁸ Five years on from the initiation of litigation and almost four years after oil began to flow through the pipeline, the Tribes were “forced to return to . . . Court to seek what they have so far been unable to obtain from the Government: an order halting pipeline operations until the

Imperative For Meaningful Tribal Consultation, 95 DENV. L. REV. 593, 594 (2018) (“Opposition to DAPL, including from more than 100 federally recognized Native American tribes, peaked during the 2016 presidential campaign year. At one point protest camps on and near the Standing Rock Sioux Reservation in North Dakota swelled to an estimated 10,000 people. A total of 761 protestors were arrested.”). See also Dan Gunderson, *‘I Live With Standing Rock in My Heart’: Massive Pipeline Protest Resonates 5 Years Later*, MPR NEWS (Apr. 1, 2021, 5:27 AM), <https://www.mprnews.org/story/2021/04/01/i-live-with-standing-rock-in-my-heart-massive-pipeline-protest-resonates-5-years-later> (“Five years ago, that small protest camp, formed near the Standing Rock Sioux Reservation in North Dakota, grew to thousands of people — and lit the spark of an international movement against the Dakota Access oil pipeline — and many pipeline projects since.”).

275. See *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 282 F. Supp. 3d 91, 95 (D.D.C. 2017).

276. See *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101 (D.D.C. 2017); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 301 F. Supp. 3d 50 (D.D.C. 2018); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 440 F. Supp. 3d 1 (D.C. Cir. 2020), *aff’d sub nom. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 985 F.3d 1032 (D.C. Cir. 2021). For detailed discussions of the legal battles, see, for example, Lee Wingard, *Back and Forth: The Continuous Legal Battle Over the Oil Flow in Dakota Access Pipeline*, 34 TUL. ENV’T L.J. 234 (2021); Chantal Carriere, *Federal Approval of Oil Pipelines and Indigenous Consultation in the United States After Standing Rock and Keystone XL: Lessons From Canada on the Limits of Industry-Indigenous Consultation*, 42 HOUS. J. INT’L L. 321, 369 (2020); Carla F. Fredericks & Jesse D. Heibel, *Standing Rock, the Sioux Treaties, and the Limits of the Supremacy Clause*, 89 U. COLO. L. REV. 477, 518 (2018).

277. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 540 F. Supp. 3d 45, 49 (D.D.C. 2021).

278. *Id.* at 50.

Corps completes its new EIS.”²⁷⁹ Earlier, the District Court held that the Corps had violated federal law by failing to produce an EIS before granting an easement to run the pipeline under Lake Oahe. Despite the subsequent vacating of the easement, and a resulting order to empty the pipeline of oil, in 2021, the Court of Appeals²⁸⁰ (and subsequently, the District Court) reversed the decision to shut down the pipeline. That left oil free to flow even as the pipeline was designated as “unlawful encroachment on federal land,” and even as the Corps remained in violation of federal environmental law.²⁸¹

From a procedural perspective, the Standing Rock Sioux simply failed to meet the burden of proof for injunctive relief.²⁸² But this procedural failure masks larger legal and political failures. As Danielle Delaney describes, in the Tribes’ DAPL litigation, the “use of environmental law as the primary legal mechanism to challenge the construction of the pipeline distorted the [I]ndigenous demand for justice as U.S. federal law is incapable of seeing the full depth of the [I]ndigenous worldview supporting their challenge.”²⁸³ #NoDAPL and the DAPL litigation reveal the extent to which the state—and environmental law—fails to recognize and protect the interests of all people. State failures are compounded by a system of law, including environmental law, that lacks legal footholds for responding to complex challenges at the intersection of environmental, cultural, and political interests.

Environmental law fails the Tribes because it was not designed to succeed here. It was not designed to respond to complex intersectional social-cultural environmental challenges. Environmental law is elegant in its scientific and administrative complexity and its sheer staying power amidst the political whirlpools in which it perpetually exists. But it is an inelegant and misfitting tool for responding—on its own—to deep structural inequalities and persistent patterns of exclusion and political marginalization.

Even as they battle to protect their basic rights, lands, water, and ways of life, Indigenous communities are advancing new visions for democracy and justice in the United States. One such campaign for

279. *Id.*

280. *Standing Rock Sioux Tribe*, 985 F.3d at 1039.

281. *Standing Rock Sioux Tribe*, 540 F. Supp. 3d at 49.

282. *Id.* at 61.

283. Danielle Delaney, *Under Coyote’s Mask: Environmental Law, Indigenous Identity, and #NoDAPL*, 24 MICH. J. RACE & L. 299, 299 (2019).

reform is the Red Deal.²⁸⁴ Created by the Red Nation, a self-defined group of “Indigenous revolutionaries,”²⁸⁵ the Red Deal is a “movement-oriented document for climate justice and grassroots reform and revolution.”²⁸⁶ The Red Deal is a vision, a platform for change, and the continuation of a centuries-long struggle for “the fulfillment of treaty rights, land restoration, sovereignty, self-determination, decolonization, and liberation.”²⁸⁷ The Red Deal embraces intersectional politics in solidarity with other left campaigns even as it pushes other law reform projects—such as the Green New Deal—to go further and to demand more.²⁸⁸

Demands for climate justice form a core part of the Red Nation’s vision for change and the Red Deal situates climate justice within ongoing struggles for social justice – including decolonization, mass incarceration, women’s rights, LGBTQ rights, and the rights to education, health care, and housing. Moreover, it centers Indigenous people as leaders in the fight for climate justice and calls for a mass movement to “reclaim our humanity and rightful relations with our earth.”²⁸⁹ To achieve Indigenous liberation and overcome the systems of colonialism and capitalism that undermine the health and dignity of the planet and the human and non-humans that live on it, the Red Deal offers a “pact that we shall strive for peace and justice and a declaration that movements for justice must come from below and to the left.”²⁹⁰

Despite the Red Nation’s sustained efforts, the radical rethinking of society that the Red Deal envisions remains at the margin of mainstream political narrative. Indigenous peoples continue to face legal and political barriers to achieving social justice and equality at every turn. They also continue to experience disproportionately the

284. Or, as Akbar suggests, the Red Deal is a “non-reformist reform” in that it advances “reforms that facilitate transformational change.” Akbar, *Demands*, *supra* note 33, at 97.

285. *About*, *supra* note 238.

286. Yazzie, *The Red Deal*, *supra* note 245, at 1. See also Melanie Yazzie, *Divest & End the Occupation: The Red Nation Launches Part One of the Red Deal*, RED NATION (Nov. 8, 2019), <http://therednation.org/divest-end-the-occupation-the-red-nation-launches-part-one-of-the-red-deal/>.

287. Yazzie, *The Red Deal*, *supra* note 245, at 1.

288. See *infra* Part IV(C) discussing the Green New Deal.

289. Yazzie, *The Red Deal*, *supra* note 245, at 4.

290. THE RED NATION, THE RED DEAL: INDIGENOUS ACTION TO SAVE OUR EARTH, <https://static1.squarespace.com/static/53f742fee4b017241942bdbe/t/6060e9f9e9c30f0939a76d2f/1616964089715/Red+Deal+press+sheet.pdf>.

effects of climate change and environmental degradation.²⁹¹ However, just as the Biden Administration is working to integrate environmental justice into law and politics, so too is it taking small steps to acknowledge that Indigenous voices and representation matter. On March 15, 2021, then-Representative Deb Haaland, a member of the Laguna Pueblo in New Mexico, was sworn in as the Secretary of Interior, making her not only the first Native American to hold this role, but also the first to serve in any Cabinet secretary position under any president.²⁹² In addition, President Biden has appointed Native Americans to key positions across his Administration,²⁹³ relaunched the White House Council on Native American Affairs,²⁹⁴ and declared it an Administrative priority to “make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations cornerstones of Federal Indian policy.”²⁹⁵

Secretary Haaland’s appointment as the head of the Department of Interior and as a member of President Biden’s Cabinet is significant. So, too, are the other steps that the Administration is taking to include Indigenous peoples and perspectives within the

291. See, e.g., Elizabeth Ann Kronk Warner, *Indigenous Adaptation in the Face of Climate Change*, 21 J. ENV’T & SUSTAINABILITY L. 129, 130 (2015) (“[tribal communities] are uniquely vulnerable to [climate change] impacts given their locations and connection to land”); Indigenous Peoples’ Global Summit on Climate Change, *Anchorage Declaration* (Apr. 24, 2009), <https://unfccc.int/resource/docs/2009/smsn/ngo/168.pdf>.

292. Olivia B. Waxman, *The Historical Significance of Deb Haaland Becoming the First Native American Cabinet Secretary*, TIME (Mar. 15, 2021, 7:19 PM), <https://time.com/5933398/deb-haaland-first-native-american-cabinet-secretary-history/>; Coral Davenport, *Deb Haaland Becomes First Native American Cabinet Secretary*, N.Y. TIMES (Mar. 15, 2021), <https://www.nytimes.com/2021/03/15/climate/deb-haaland-confirmation-secretary-of-interior.html>.

293. Jenna Kunze, *More Native Americans Named to Key Posts in Biden Administration*, NATIVE NEWS ONLINE, (Feb. 16, 2021), <https://nativenewsonline.net/currents/more-native-americans-named-to-key-posts-in-biden-administratio>. The Biden Administration has also appointed Indigenous allies to key positions, including a preeminent Native American legal scholar, Professor Sarah Krakoff, to the position of Deputy Solicitor for Parks and Wildlife. Press Release, U.S. Department of the Interior, Interior Department Announces Newest Members of Agency Team (Apr. 20, 2021), <https://www.doi.gov/pressreleases/interior-department-announces-newest-members-agency-team>.

294. Press Release, U.S. Department of the Interior, Biden Administration Resumes White House Council on Native American Affairs (Apr. 15, 2021), <https://www.doi.gov/pressreleases/biden-administration-resumes-white-house-council-native-american-affairs>.

295. Memorandum From the White House on Tribal Consultation and Strengthening Nation-to-Nation Relationships, (Jan. 26, 2021) (<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>).

heart of the body politic. Like Foster's appointment to WHEJAC, these small but discernible shifts are a testament to the collective power and persistence of Indigenous activism.²⁹⁶ Outside of the hallways of power, however, Indigenous peoples continue to be displaced by climate change, oil continues to flow through sacred lands and waters, and Indigenous voices continue to be sidelined in environmental and climate change decision-making processes.²⁹⁷ These persistent patterns of exclusion reveal the limits of existing legal and political processes, including environmental law.

C. *Democracy Re-Envisioned: The New Voices Infiltrating the Halls of Power*

Environmental and climate law are defined by “[p]rofound inequities in power.”²⁹⁸ Power, understood as “the ability to effect substantive policy outcomes by influencing what the government will or will not do,”²⁹⁹ has never been equitably distributed in the environmental context. The environmental and climate justice movements are testament to the gross imbalances of power that characterize legal and political frameworks.³⁰⁰ Alongside the EJ and climate justice movements, the youth climate movement and

296. Bowman, *supra* note 179.

297. See THE ALASKA INST. FOR JUST., RIGHTS OF INDIGENOUS PEOPLE IN ADDRESSING CLIMATE-FORCED DISPLACEMENT (2020); Debra Utacia Krol, *In Louisiana, A Plan to Relocate The Country's First 'Climate Refugees' Hits a Roadblock*, HUFFPOST (Mar. 3, 2018, 1:56 PM), https://www.huffpost.com/entry/louisiana-climate-refugees-plan-roadblock_n_5ab402ade4b008c9e5f55c1b; Robin Bronen, *Climate-Induced Displacement of Alaska Native Communities*, BROOKINGS-LSE (Jan. 30, 2013), <https://www.brookings.edu/wp-content/uploads/2016/06/30-climate-alaska-bronen-paper.pdf>; U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-551, ALASKA NATIVE VILLAGES: LIMITED PROGRESS HAS BEEN MADE ON RELOCATING VILLAGES THREATENED BY FLOODING AND EROSION.

298. Kate Andrias, *Confronting Power in Public Law*, 130 HARV. L. REV. F. 1, 4 (2016). For a discussion of the politics of power in the context of the “hegemony of cost-benefit analysis” in environmental law, see Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405, 1408 (2005). See also Shalanda H. Baker, *Anti-Resilience: A Roadmap for Transformational Justice Within the Energy System*, 54 HARV. C.R.-C.L. L. REV. 1, 15 (2019) (“As society moves to mitigate the existential threat of climate change through the adoption of clean energy resources, energy decision makers appear poised to replicate the power dynamics, structural inequality, and “sacrifice zones” of dirty energy’s past.”).

299. Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 39 (2016).

300. See ROBERT STAVINS ET AL., IPCC, INTERNATIONAL COOPERATION: AGREEMENTS AND INSTRUMENTS, in CLIMATE CHANGE 2014: MITIGATION OF CLIMATE CHANGE. CONTRIBUTION OF WORKING GROUP III TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 1027.

Indigenous peoples movements seek to harness power through collective action. Hierarchies of power, however, are deeply embedded in our democracy.³⁰¹ Even when activists work in solidarity, their power remains diffuse compared to the centralized structures of state power.³⁰² Having allies in the center of state power structures can help advance alternative visions for society, and for the rule of law in society.

As Varshini Prakash articulates on behalf of the Sunrise Movement, “people power without political power will not suffice . . . we need allies in office — because otherwise, we’re just railing against a group of people who aren’t accountable to our values or our communities.”³⁰³ Political power, Prakash suggests, can be accessed by cultivating a “critical mass of enthusiastically supportive public officials who back up [their support] with action.”³⁰⁴ From Senators Edmund Muskie and Gaylord Nelson in the 1970s,³⁰⁵ to Vice President Al Gore in the 1990s,³⁰⁶ and President Obama in the early millennium,³⁰⁷ the United States has a strong history of environmental leadership. As discussed, however, until recently, even the most progressive political leaders failed to advance meaningful action on climate change. This is slowly changing.

In 2013, a progressive electoral wave³⁰⁸ resulted in the election of new leaders such as Senator Elizabeth Warren (D-MA) and

301. Andrias, *supra* note 298, at 2 (“*First*, confronting particular social problems and their human consequences, rather than remaining at a high level of abstraction, can deepen the account of how power functions in public law. *Second*, confronting power’s distribution with material detail can help elucidate a path for reform.”). *See also generally* Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1786–94 (2020) (arguing that political economy should be central to legal scholarship).

302. Here recognizing that there can be deep divides among and between different left or progressive movements with respect to vision, objectives, strategy, and tactics.

303. Klein, *supra* note 206.

304. *Id.*

305. *See, e.g.*, Richard J. Lazarus, *A Different Kind of “Republican Moment” in Environmental Law*, 87 MINN. L. REV. 999, 1003 (2003).

306. In 2007, former Vice President Al Gore Jr. and the Intergovernmental Panel on Climate Change were jointly awarded the Nobel Peace Prize “for their efforts to build up and disseminate greater knowledge about man-made climate change, and to lay the foundations for the measures that are needed to counteract such change.” *The Nobel Peace Prize 2007*, NOBEL PRIZE, <https://www.nobelprize.org/prizes/peace/2007/summary/> (last visited Feb. 3, 2021).

307. For a discussion of both the strengths and weaknesses of President Obama’s climate leadership, see Carlarne, *Decade of Flux*, *supra* note 11, at 115–20.

308. The Editors, *The Progressive Electoral Wave of 2013*, THE NATION (Nov. 13, 2013), <https://www.thenation.com/article/archive/progressive-electoral-wave-2013/>.

Representative Katherine Clark (D-MA). Over the next few election cycles, progressive politicians such as Representative Ted Liu (D-CA, 2014) and Pramila Jayapal (D-WA, 2016) joined the growing ranks of the Progressive Caucus.³⁰⁹ The midterm elections of 2018 then brought a sea change in the progressive composition of Congress.³¹⁰ By 2019, a new, younger, more diverse group of progressive leaders were in place and working to push Congress left. Notable among these new leaders is a group of representatives, colloquially referred to as “the Squad.” Constituting the original squad are Alexandria Ocasio-Cortez (D-NY), Ilhan Omar (D-MN), Rashida Tlaib (D-MI) and Ayanna Pressley (D-MA).³¹¹ All four representatives are women of color and each made history when they were first elected in 2018.³¹² Since taking office in January 2019, this small group of lawmakers “have electrified the left’s progressive base and lit up social media.”³¹³

309. See, e.g., *Caucus Members*, CONG. PROGRESSIVE CAUCUS, <https://progressives.house.gov/caucus-members> (last visited Apr. 16, 2022); *Jayapal Elected Chair of the Congressional Progressive Caucus*, PRAMILA JAYAPAL CONGRESSWOMAN FOR WA-07 (Dec. 9, 2020), <https://jayapal.house.gov/2020/12/09/jayapal-elected-cpc-chair/>.

310. See, e.g., Dylan Scott, *The Left’s Gains in the 2018 Democratic Primaries, Explained in 3 Charts*, VOX (July 19, 2018, 8:30 AM), <https://www.vox.com/policy-and-politics/2018/7/19/17585606/2018-midterm-elections-democrats-ocasio-cortez>.

311. Representatives Ocasio-Cortez and Omar were supported in their congressional bids by the Justice Democrats, a progressive federal political action committee that also helped elect new Squad members in 2020, including Jamaal Bowman of New York, Cori Bush of Missouri, and Marie Newman of Illinois. See Jenna Amatulli, *The Squad’s Here To Stay: Ocasio-Cortez, Pressley, Omar and Tlaib Win Reelection*, HUFFPOST (Nov. 4, 2020, 12:46 AM), https://www.huffpost.com/entry/squad-aoc-ilhan-omar-rashida-tlaib-ayanna-pressley_n_5fa23296c5b63dc9a5c22f64; *About Justice Democrats*, JUSTICE DEMOCRATS, <https://justicedemocrats.com/about/> (last visited July 1, 2021).

312. Kate Sullivan, *Here Are the 4 Congresswomen Known as ‘The Squad’ Targeted by Trump’s Racist Tweets*, CNN NEWS (July 16, 2019, 10:11 AM), <https://www.cnn.com/2019/07/15/politics/who-are-the-squad/index.html>. As just a brief insight into their historical achievements, born and raised in the Bronx by working class Puerto Rican parents, Representative Ocasio-Cortez was the youngest woman ever elected to Congress, defeating 10-term incumbent Representative Joe Crowley in her first congressional campaign. For her part, Representative Omar, who came to the U.S. as a child of Somali refugees and became a U.S. citizen in 2000, was the first Somali American elected to Congress. Representative Tlaib was the first Palestinian-American woman elected to Congress, and along with Representative Omar, is one of the first two Muslim women to ever serve in Congress. Finally, Representative Pressley was the first African American woman elected by Massachusetts to serve in Congress. *Id.*; see also *AOC, Omar, Pressley, Tlaib: Who Are ‘the Squad’ of Congresswomen?*, BBC NEWS (July 18, 2019), <https://www.bbc.com/news/world-us-canada-48994931>.

313. Lauren Dezenski, *All 4 Members of ‘The Squad’ Reelected to House*, CNN NEWS (Nov. 4, 2020, 1:06 AM), <https://www.cnn.com/2020/11/03/politics/alexandria-ocasio-cortez-wins-house-seat/index.html>; see also Alex Seitz-Wald, *AOC and ‘The Squad’ Are Getting Some Company. Here’s Who is Joining the Team*, NBC NEWS (Dec. 12, 2020, 3:00 AM), <https://www.nbcnews.com/politics/2020-election/aoc-squad-are-getting-some-company-here-s-who-joining-n1250958> (“The squad began with an Instagram caption” and “Ocasio-

As they energized the electorate, they also created space for more progressive leaders to join them in Congress.³¹⁴ In 2020, not only did all four members of the Squad win reelection by wide margins, they also expanded their ranks to include two newly elected Representatives—Jamaal Bowman (D-NY) and Cori Bush (D-MO).³¹⁵

Together with Congressional allies, the Squad pushes for change on issues core to the progressive social movements that helped elect them. In a short period of time, they have become “important amplifiers for radical demands.”³¹⁶ They are fighting to shift the Democratic party to the left and to “bring[] back social democracy as a political ideal.”³¹⁷ Their target areas of reform are expansive and include topics ranging from immigration policy, systemic racism, economic inequality, and health care to what they see as imperialist foreign relation policies and deep-seeded corporate and political corruption.³¹⁸ The reform the Squad pushes for is structural and intersectional.³¹⁹

Among the Squad’s core areas of focus is climate change or, more

Cortez [has since become] one of the most influential politicians on social media.”); Sullivan, *supra* note 312 (One of the reasons the members of the Squad have been so effective is “their social media savvy.”).

314. Out of the fifteen congress members elected for the first time in 2020, “eight are members of the Congressional Progressive Caucus and at least four have ties to the squad.” Among those elected was Representative Mondaire Jones, who was a former Obama Justice Department lawyer. He will be one of the first openly gay Black men in Congress, along with freshman Representative Ritchie Torres. Seitz-Wald, *supra* note 313.

315. Amatulli, *supra* note 311. Representative Bowman, the first male member of the Squad, defeated sixteen-term incumbent Eliot Engel, and he has focused his energy on dismantling institutional racism. Representative Bush is the first Black woman elected to Congress by Missouri, and she has partnered with Representative Ocasio-Cortez in her efforts to advance the Green New Deal. See Seitz-Wald, *supra* note 313; Anthony Adragna, *Progressives Formally Reintroduce the Green New Deal*, POLITICO (Apr. 20, 2021, 1:10 PM), <https://www.politico.com/news/2021/04/20/green-new-deal-congress-483485>.

316. Akbar, *Demands*, *supra* note 33, at 96, 99 (“[T]he Squad’ organizes around large-scale changes that are mobilizing young people and a broader ideological base.”).

317. Sonja Krieger, *Reform, Not Revolution: The Squad*, LEFT VOICE (Apr. 1, 2020), <https://www.leftvoice.org/reform-not-revolution-the-squad/>.

318. Barbara Ransby, *‘The Squad’ is the Future of Politics: You Can Credit Social Movements for That*, NY TIMES (Aug. 8, 2019), <https://www.nytimes.com/2019/08/08/opinion/the-squad-democrats.html>.

319. See Danielle Kurtzleben, *Rep. Alexandria Ocasio-Cortez Releases Green New Deal Outline*, NPR (Feb. 7, 2019, 4:30 PM), <https://www.npr.org/2019/02/07/691997301/rep-alexandria-ocasio-cortez-releases-green-new-deal-outline>; David Roberts, *Sen. Ed Markey: ‘We Are Now in the Era of the Green New Deal’*, VOX (Apr. 16, 2019, 10:00 AM), <https://www.vox.com/energy-and-environment/2019/4/16/18306596/green-new-deal-climate-change-ed-markey>; Robinson Meyer, *The Millennial Era of Climate Politics Has Arrived*, THE ATLANTIC (Feb. 7, 2019), <https://www.theatlantic.com/science/archive/2019/02/aogreen-new-deal-new-era-millennial-climate-politics/582295/>.

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accurately, climate justice and just transition. Representative Ocasio-Cortez ran on a campaign that declared climate change to be the “single biggest national security threat for the United States and the single biggest threat to worldwide industrialized civilization,” and called for a transition to a zero-carbon economy by 2035.³²⁰ Following her election, she immediately doubled down on her commitments to her campaign promises and to the movements that helped elect her. Within a month of her election, then Representative-elect Ocasio-Cortez partnered with Senator Ed Markey to announce their plans to roll out “this moment’s climate manifesto,” the Green New Deal.³²¹ Even as she worked to transform the law from within the hierarchy of power, she worked to dismantle it from the outside as she joined members of the Sunrise Movement in a sit-in protest pushing for a Green New Deal in House Speaker Nancy Pelosi’s Capitol Hill office.³²² In response to criticism of her decision to join the youth protesters in “storm[ing]”³²³ Speaker Pelosi’s office, her spokesperson stated unequivocally:

She was elected as part of the movement, she intends to govern as part of the movement. She thinks there is no other priority that we should be focused on and supports the sunrise movements [sic] call for Democrats to create a plan to transition the economy to a zero carbon economy.³²⁴

Representative Ocasio-Cortez’s commitment to climate change and to movement politics has persisted. Together with her Congressional

320. See John Haltiwanger, *This is the Platform That Launched Alexandria Ocasio-Cortez, a 29-Year-Old Democratic Socialist, to Become the Youngest Woman Ever Elected to Congress*, BUSINESS INSIDER (Jan. 4, 2019, 2:48 PM), <https://www.businessinsider.com/alexandria-ocasio-cortez-platform-on-the-issues-2018-6>; Nik DeCosta-Klipa, *Ed Markey and Alexandria Ocasio-Cortez Are Planning to Introduce a Green New Deal Bill*, BOSTON.COM (Jan. 31, 2019), <https://www.boston.com/news/politics/2019/01/31/green-new-deal-ed-markey-alexandria-ocasio-cortez/>.

321. DeCosta-Klipa, *supra* note 320 (quoting Senator Ed Markey).

322. See *id.*; Ruairí Arrieta-Kenna, *The Sunrise Movement Actually Changed the Democratic Conversation. So What Do You Do For a Sequel?*, POLITICO (June 16, 2019), <https://www.politico.com/magazine/story/2019/06/16/sunrise-movement-boot-camp-227109/>.

323. Anthony Adragna & Zack Colman, *Ocasio-Cortez, Youth Protesters Storm Pelosi Office to Push for Climate Plan*, POLITICO (Nov. 13, 2018, 12:23 PM), <https://www.politico.com/story/2018/11/13/ocasio-cortez-climate-protestors-push-pelosi-962915>.

324. See Miranda Green, *Ocasio-Cortez Joins Climate Change Sit-In at Pelosi’s Office*, THE HILL (Nov. 13, 2018, 11:31 AM), <https://thehill.com/policy/energy-environment/416411-youth-protestors-fill-nancy-pelosis-office-demanding-climate-change>.

allies, including Senator Markey and Representative Bush, she has taken what began as the Sunrise Movement's "widely mocked" proposal for a Green New Deal and helped transform it into a set of policies and a vision that was endorsed by sixteen of the Democrats running for president in 2020, including then Presidential candidate Joe Biden.³²⁵

Similar Green New Deal proposals are being advanced in the United States and around the world.³²⁶ The proposals vary but share a focus on tackling climate change as a social, political, and economic challenge that demands a mix of legal and policy measures that address overlapping needs for economic recovery, just energy transition, social equality, and environmental sustainability. In the United States, the Green New Deal is a set of policies that "seek[] to align environmental and climate policy with a wide range of progressive social policy goals, such as labor protections, racial justice, and greater wealth equality."³²⁷

First introduced in Congress by Representative Ocasio-Cortez and Senator Markey on February 7, 2019, the Green New Deal was a nonbinding congressional resolution that laid out a comprehensive plan for tackling climate change.³²⁸ Based on a set of proposals advanced by the Sunrise Movement, the resolution framed climate change as a crisis that exacerbates systemic injustice and intersects with the related crises of racial and economic inequality, declining life expectancy, wage stagnation, deindustrialization, and anti-labor policies.³²⁹ In response to these intersecting crises, it proposed a sweeping new national, social, industrial, and economic response along the lines of FDR's New Deal that would advance and invest enormous resources in programs to achieve net-zero greenhouse gas emissions through a fair and just transition for all communities and

325. Arrieta-Kenna, *supra* note 322.

326. For information about the European Green Deal, see *A European Green Deal*, EUROPEAN COMMISSION, https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en (last visited June 15, 2021); Jon Bloomfield & Fred Steward, *The Politics of the Green New Deal*, 91 POL. Q. 770 (2020). See also Sarwat Chowdhury, *South Korea's Green New Deal in the Year of Transition*, UNDP (Feb. 8, 2021), <https://www.undp.org/blogs/south-koreas-green-new-deal-year-transition>; Edward Barbier, *A Global Green New Deal*, Report Prepared for the Green Economy Initiative of UNEP, 2009, <https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=670&menu=1515>.

327. Wyatt G. Sassman & Danielle C. Jefferis, *Beyond Emissions: Migration, Prisons, and the Green New Deal*, 51 ENV'T L. 161, 163 (2021).

328. Meyer, *supra* note 319.

329. Kurtzleben, *supra* note 319.

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workers.³³⁰ A core component of the vision of the Green New Deal is the emphasis on creating opportunities for communities of color, which, as Akbar reminds us, have “long borne the brunt of ecological decline, neoliberal divestment, and substandard pay for essential work.”³³¹

When the Green New Deal was first rolled out in 2019, during the Trump administration, it did not gain much traction in Congress.³³² However, while Congress did not take up the Green New Deal, the proposal received extensive media coverage. The resulting media coverage helped broaden the narrative around climate change and create space for more progressive conversations and actions. The resolution gave voice to a growing chorus of diverse movement actors fighting for a reframing of climate change, and it created a powerful framework that the Biden administration is now drawing heavily upon in its efforts to address climate change.³³³ Ushered in by Representative Ocasio-Cortez and Senator Markey, the Green New Deal brought the voices and visions of the youth climate movement, the Indigenous peoples movement, and the environmental and climate justice movements into the halls of power.

In no small part due to the efforts of the Squad and their allies, when President Biden took office in January 2020, he inherited a Congress “far more progressive than the one Barack Obama inherited

330. *Id.* As Gunn-Wright and Hockett describe, the GND is “Green”:

[I]n the sense that its aim is to modernize our economy comprehensively so that we no longer have to poison our environment, subsidize decaying infrastructure, and sacrifice poor and working class communities to all manner of pollution and environmental degradation, simply to produce wealth that benefits a tiny fraction of Americans.

And it is a “New Deal” because it seeks to work “on a scale not seen in our country since the New Deal and World War II mobilizations.” Rhiana Gunn-Wright & Robert Hockett, *The Green New Deal: Mobilizing for a Just, Prosperous, and Sustainable Economy*, CONSENSUS (Jan. 2019), https://s3.us-east-2.amazonaws.com/ncsite/new_conesnsus_gnd_14_pager.pdf.

331. Akbar, *Demands*, *supra* note 33, at 114.

332. See, e.g., Matt Huber, *Why the Green New Deal Has Failed – So Far*, JACOBIN, <https://jacobinmag.com/2021/05/green-new-deal-climate-change> (“This rollout was, unfortunately, badly botched. Ocasio-Cortez’s office released an FAQ document to the media. The document — which appeared to be written by her then–chief of staff, Saikat Chakrabarti — was not only poorly written and sloppy but contained alienating environmentalist language like describing a long-term goal to ‘fully get rid of farting cows and airplanes.’”)

333. See Whitehouse & Huffman, *supra* note 15; Kurtzleben, *supra* note 319; Klein, *supra* note 206; Nilsen, *supra* note 182.

in 2009.”³³⁴ This creates opportunities for President Biden to work in solidarity with progressive leaders to advance environmental and climate justice in ways that were not afforded to his predecessors. These opportunities and that privilege exists due to the convergence of organized progressive movements and allied lawmakers. President Biden has demonstrated a willingness to engage with progressive voices. From the narrative he uses to discuss climate change,³³⁵ to his executive actions on environmental justice and climate change,³³⁶ to the people he is surrounding himself with,³³⁷ President Biden’s actions demonstrate a cautious solidarity with those who are calling for bolder and more decisive action on climate change. The brunt of the challenge to craft and implement a comprehensive climate strategy remains ahead of him, however.

Buoyed by growing levels of support inside and outside Congress, progressive lawmakers³³⁸ have been pushing forward new EJ bills, including the Environmental Justice For All Act,³³⁹ and the Environmental Justice Mapping and Data Collection Act of 2021.³⁴⁰ The pending bills seek to elevate environmental justice in federal policy by acknowledging systemic injustices, identifying environmental justice communities, creating new causes of action,

334. Amatulli, *supra* note 311 (quoting Alexandra Rojas, executive director of Justice Democrats).

335. See, e.g., *Gina McCarthy Talks About the Intersectionality of Climate Change*, *supra* note 82.

336. Keith Gaby, *5 Great Things Biden Did for the Climate in 100 Days — and 4 Things He Should Do Next*, ENVIRONMENTAL DEFENSE FUND (Apr. 28, 2021), <https://www.edf.org/blog/2021/04/28/5-great-things-biden-did-climate-100-days-and-4-things-he-should-do-next>.

337. In addition to the appointments already discussed, see, for example, Lisa Friedman, *Biden Introduces His Climate Team*, N.Y. TIMES (Dec. 22, 2020), <https://www.nytimes.com/2020/12/19/climate/biden-climate-team.html>; UH Law Professor Tapped for Role in Biden Administration, U. OF HAWAI’I (June 24, 2021), <https://www.hawaii.edu/news/2021/06/24/law-professor-biden-administration/> (discussing the nomination of Professor Maxine Burkett, a climate law and climate justice expert, to serve as a senior advisor with the Office of the Special Presidential Envoy for Climate).

338. *Senators Markey and Duckworth, Rep. Bush Introduce Legislation to Help Identify Environmental Justice Communities*, ED MARKEY: UNITED STATES SENATOR FOR MASSACHUSETTS (Jan. 28, 2021), <https://www.markey.senate.gov/news/press-releases/senators-markey-and-duckworth-rep-bush-introduce-legislation-to-help-identify-environmental-justice-communities>.

339. Environmental Justice for All Act, H.R. 5986, 116th Cong. (2019-2020).

340. Environmental Justice Mapping and Data Collection Act of 2021, H.R. 516, 117th Cong. (2021-2022).

and supporting reinvestment in EJ communities.³⁴¹

In addition to pushing forward EJ bills, in April 2021, Representative Ocasio-Cortez and Senator Markey reintroduced the Green New Deal resolution, this time accompanied by a promise that it would be followed by additional bills.³⁴² In re-introducing the Green New Deal, Representative Ocasio-Cortez announced, “[w]e’re going to transition to a 100 percent carbon free-economy that is more unionized, more just, more dignified and guarantees more health care and housing than we ever have before.” Senator Markey, for his part, declared that the Green New Deal is not “just a resolution — it is a revolution.”³⁴³ Together they emphasized that the reintroduced Green New Deal is designed to send a message to President Biden that what is needed, and what is demanded is bigger even than what he has proposed.³⁴⁴ As Senator Markey stated, “this is the moment that requires us to act big, think big, have a program that matches the magnitude of the problem that we’re confronted with. And to do so with justice.”³⁴⁵

Although the Green New Deal resolution continues to linger in Congress, tendrils of the resolution can be found in the 2021 Infrastructure Investment and Jobs Act (Infrastructure Act).³⁴⁶ Although the \$1.2 trillion bipartisan Infrastructure Act has a broad, economy-wide focus, it is one of the most comprehensive climate laws to date.³⁴⁷ As characterized by the Biden White House, the Act will “strengthen our nation’s resilience to extreme weather and climate change while reducing greenhouse gas emissions, expanding access to clean drinking water, building up a clean power grid, and more.”³⁴⁸ When paired with the other components of President

341. H.R. 516, § 2. *See also* Leah Clyburn, *Cori Bush Brings Environmental Justice to Congress*, SIERRA CLUB (Mar. 29, 2021), <https://www.sierraclub.org/articles/2021/03/cori-bush-environmental-justice-bill>.

342. Adragna, *supra* note 315.

343. *Id.*

344. Adam Aton, *Biden Team Defends Climate Plan Amid Progressive Grumbling*, E&E NEWS (Apr. 2, 2021, 7:03 AM), <https://www.eenews.net/stories/1063729105>.

345. Adragna, *supra* note 315.

346. Infrastructure Investment and Jobs Act (PL 117-58, 11/15/2021).

347. For a critical assessment of the climate progress the Infrastructure Act achieves, see Morgan Higman, *The Infrastructure and Jobs Act Will Do More to Reach 2050 Climate Targets Than Those of 2030*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (Aug. 18, 2021), <https://www.csis.org/analysis/infrastructure-investment-and-jobs-act-will-do-more-reach-2050-climate-targets-those-2030>.

348. *Fact Sheet: The Bipartisan Infrastructure Deal Boosts Clean Energy Jobs, Strengthens Resilience, and Advances Environmental Justice*, WHITE HOUSE (Nov. 8, 2021),

Biden's executive and legislative strategy—including plans for a Civilian Climate Corps³⁴⁹ and ongoing efforts to advance a Build Back Better Framework,³⁵⁰ the Infrastructure Act advances transformational change that institutionalizes climate action.³⁵¹ It is unlikely that the thick climate focus in the Act would have been possible absent persistent efforts by progressive lawmakers to infuse climate considerations into congressional conversations.

The Squad and their progressive allies in Congress create counterparts to, and political vehicles for the rising tide of demands coming from the environmental and climate justice movements. Their primary climate proposal, the Green New Deal, offers an integrative legal approach that responds to the root causes of climate change and proposes sustainable system-wide transformational change. It advances a more inclusive and intersectional approach to environmental law. It advances the project of reimagining and remaking environmental law. And the ideas it advances increasingly

<https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/08/fact-sheet-the-bipartisan-infrastructure-deal-boosts-clean-energy-jobs-strengthens-resilience-and-advances-environmental-justice/>.

349. See *Executive Order on Tackling the Climate Crisis at Home and Abroad*, *supra* note 222.

350. The White House, *The Build Back Better Framework*, <https://www.whitehouse.gov/build-back-better/> (last visited Mar. 20, 2022); Build Back Better Act, H.R. 5365, 117th Cong. (2021/2022).

351. According to the White House fact sheet:

When paired with the Build Back Better Framework which the President also looks forward to signing into law, these once-in-a-generation investments will reduce our emissions by well over one gigaton this decade—ensuring we meet President Biden's commitment to reduce U.S. emissions by 50-52% from 2005 levels in 2030 and unlock the full potential of a clean energy economy that combats climate change, advances environmental justice, and creates good-paying, union jobs.

Fact Sheet: President Biden Signs Executive Order Catalyzing America's Clean Energy Economy Through Federal Sustainability, WHITE HOUSE (Dec. 8, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/08/fact-sheet-president-biden-signs-executive-order-catalyzing-americas-clean-energy-economy-through-federal-sustainability/>. The Infrastructure Act creates the strongest foundations yet for transitioning to a clean energy economy, reducing greenhouse gas emissions, and creating a climate-resilient society. In key part, in addition to providing the largest ever federal investment in clean energy transmission and the electric grid (\$64 billion), the Act provides significant economic investment in public transit; electric vehicle infrastructure; zero-emission school buses; modernizing physical infrastructure (e.g., ports, airports, freight) to make it more sustainable and resilient; improving community resiliency through investments in weatherization of homes and other efforts to protect against drought, heat, and floods; improving access to clean drinking water; and addressing legacy pollution sites.

infuse executive and congressional actions.

The work that the youth, Indigenous peoples, and progressive political leaders are advancing draws from and advances the long-standing work of environmental justice, climate justice, and climate rights advocates worldwide. The work of reforming environmental law and crafting effective and equitable climate law is at an important inflection point. Now, more than ever, is the time to heed the lessons of the past and the diverse, multivocal perspectives of the present. This work is beginning, but more learning, listening, and responding is needed, as this Part demonstrates.³⁵²

V. CONCLUSION

We are living in the shadow of convergent crises. Social, racial, and economic inequality tears at the fabric of democracy. Global ecological crisis rips at the seams of social stability. Amidst these convergent crises, climate change looms. It shapes the context within which society, law, and economies will evolve in the 21st Century. It shapes how individual lives will play out. Responding to climate change requires cathedral thinking. It requires leaders who envision a more equitable and sustainable future, defy incrementalism, embrace ingenuity, and, above all, exhibit the foresight and courage necessary to launch us down a long pathway towards change. It requires us to rethink the role that law and, here in particular, environmental law plays in advancing transformative change.

Climate change compels us to challenge the limits and possibilities of environmental law. It invites us to reimagine the redemptive capacity of environmental law in the shadow of the climate crisis. And it requires that we do so urgently and in solidarity with those who are already doing the work of envisioning a more expansive role for the rule of law in addressing one of the greatest challenges of our time.³⁵³

352. For an excellent overview of this work in the context of environmental justice, see Villa, *supra* note 10.

353. See Jacqui Patterson, *At the Intersections* 201, in *ALL WE CAN SAVE*, *supra* note 171. (“Across the country and the world, community by community, people are building microcosms of the systems and societies we need to reverse the tide of catastrophic climate change and become a world that respects all rights for all people, in harmony with Mother Earth.”).